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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES GRIFFIN AND
JEROME GRIFFIN,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *South Dakota* v. *Opperman* and *Illinois* v. *Lafayette's* approval of routine inventory searches justifies the warrantless search of a sealed container found in a closed compartment of an impounded automobile.

2. Whether the majority opinion of the Court of Appeals contravened a ruling precedent of this Court in failing to hold and in failing to find that the search in question was not performed in accordance with established inventory procedures.

3. Whether the majority opinion of the Court of Appeals contravened a ruling precedent of this Court in failing to find that there was inadequate evidence of a "standardized procedure" which was followed and which took the search out of the absolute discretion of the officer.

PARTIES

The caption of this cause lists all parties.

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v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Charles E. Griffin and Jerome Griffin, by their counsel, petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at 729 F2d 475. The order of the District Court is unreported and found in App. B, p. 26-A to 59-A.

JURISDICTION

The judgment of the Court of Appeals, (App. C, *infra*) was entered on February 28, 1984. A timely petition for rehearing was denied on April 13, 1984 (App. D, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourth Amendment to the Constitution of the United States, and its protection against unreasonable searches and seizures. (App. E, *infra*)

STATEMENT

On December 3, 1982, Charles and Jerome Griffin were charged with unlawful possession with the intent to distribute 805 grams of phencycledine, in violation of 21 U.S.C. Section 841(a)(1) (1982). The defendants moved to suppress the introduction of the phencycledine into evidence on the grounds that it was obtained without a valid search warrant.

The evidence at the Motion to Suppress hearing revealed that in the early evening hours of December 2, 1982 Indiana State Trooper Hostetter stopped a 1982 Corvette on the Indiana Toll Road for an "improperly displayed registration" (to-wit: a dirty license plate). (TR 63)[1]. Hostetter asked the driver of

[1] TR means Transcript of evidence at Hearing on Motion to Suppress.

the vehicle, Jerome Griffin, for his operator's license and vehicle registration but Jerome was unable to produce either document. (TR 65). Being unable to produce a valid driver's license, Hostetter instructed Jerome Griffin to exit the 1982 Corvette (TR 66). Hostetter advised Jerome that he would receive a warning for the improperly displayed registration and that he would be cited for failing to possess a valid operator's license. When informed that the fine for operating an automobile without a valid license was between $40.00 and $50.00 Jerome asked for and was given permission to borrow the money needed to pay his fine from his cousin, Charles Griffin, the only passenger in the Corvette. (TR 67). State Police Trooper Nufer requested identification from Charles Griffin and Charles presented Nufer with a valid Indiana driver's license. Nufer ran a routine check on Charles Griffin in Lake County, Indiana, Charles' county of residence, and learned that an outstanding bench warrant existed for Charles' failure to appear in Court on October 8, 1982 for an unrelated traffic violation. (TR 68). Based upon this information, Nufer arrested Charles Griffin and placed him in custody and arranged for his return to Lake County. (TR 69).

Jerome Griffin obtained the cash needed to pay his fine from Charles and then informed Charles that the Indiana State Police were going to impound the Corvette because neither Jerome, who had no valid driver's license, nor Charles, who was under arrest, could lawfully remove the vehicle from the toll road. (TR 69). Charles objected and suggested that the vehicle remain parked in the emergency lane of the roadway until Charles' girlfriend arrived to drive it back to Gary, Indiana (TR 70). Trooper Hostetter refused to leave the automobile on the side of the well traveled Indiana Toll Road due to the danger it presented to passing nighttime motorists and the high incident of theft inherent in a late model sports car such as a 1982 Corvette. (TR 70). Hostetter followed the "standard operating procedure" of the Indiana State Police

Department and impounded the vehicle. (TR 71)[2]. Hostetter directed Jerome Griffin to lock the Corvette and the two of them proceeded to the Courthouse in Fremont, Indiana, while Nufer arranged for Charles Griffin to be returned to Lake County, Indiana (TR 70). The Corvette, though locked, remained unattended for approximately the next 45 minutes (App. B, p. 36-A). In the Fremont Court, Jerome pleaded guilty to the charge of failing to possess a valid operator's license and paid the statutory fine and costs. During Jerome's court appearance, Roger Fulton arrived at the Courthouse in response to Hostetter's request that the towing service provide a driver to remove the Corvette from the Indiana Toll Road. (TR 71). It was standard procedure to allow the towing service to drive the Corvette rather than tow it, due to the possibility that towing might damage the sports car transmission and/or fiberglass body. (TR 71).

At this point in time, Jerome was free to go but returned with Hostetter to the Corvette so that he might retreive his apartment keys (TR 73). When Jerome, Fulton and Hostetter arrived at the vehicle, the driver's door was unlocked and Jerome was allowed to search for his apartment keys. (TR 73). While conducting his inventory, Hostetter reached into the open area behind the passenger's seat of the two seat vehicle and removed the lid from an unlocked storage compartment. Hostetter observed two hand guns within the compartment and replaced the storage lid. (TR 74). Hostetter found Jerome's apartment keys and returned the same to Jerome. Following the discovery of Jerome's keys Hostetter checked the revolvers to determine if they were loaded (TR 74). He observed that ammunition clips were in the weapons and he also observed that a brown paper bag was lying beneath the two revolvers in

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[2] Although, at the hearing on the motion to suppress, Trooper Hostetter admitted his lack of familiarity with the content of any rules or regulations pertaining to this standard operating procedure and even testified "... [I] should of maybe taken the time to read it." (TR 82).

the unlocked storage compartment. (TR 74). Hostetter removed the brown paper bag from the compartment, opened the brown paper bag, and within the bag discovered a package wrapped in brown paper and secured and wrapped almost completely with fibrous plastic tape. (TR 74-75). Rather than opening the package at that time, Hostetter placed the package back inside the brown paper bag, returned the bag and the revolvers to the compartment, and instructed Fulton to drive the Corvette to a maintenance area located "about 2 miles" down the highway. (TR 74-75). Once at the maintenance area, Hostetter removed the brown paper bag from the storage compartment (TR 75). Hostetter had no knowledge of what the brown paper bag contained nor what was in the brown paper package with fibrous tape, but decided that for purposes of his inventory, he must itemize the bag's contents as he was "responsible for what [was] in it" (TR 75). Hostetter removed the taped wrapped package from the brown paper bag and tore open an end portion "to see what was in it to put down on his inventory." (TR 75). Hostetter observed a yellow substance in a clear plastic bag but did not open the plastic bag, instead he radioed Officer Nufer to join him at the maintenance area (TR 75). Nufer arrived at the maintenance area and after observing the yellow substance contained within the sealed, clear plastic bag, within the brown paper bag wrapped with fiberous tape which was found in the open paper sack, Nufer informed Hostetter that he believed the package contained a controlled substance (TR 76). The Indiana State Police Lab later analyzed the contents of this clear plastic bag, within the brown paper bag wrapped tightly with fibrous tape found within the brown paper sack and identified the substance as 805 grams of phencycledine, a Schedule II controlled substance.

The district court granted the defendants pre-trial motion to suppress, ruling that the warrantless search did not fall within any of the recognized exceptions to the warrant requirement, including a search incident to an arrest, an automobile inventory, the automobile exception, or plain view, and therefore, was invalid. (App. B).

The government appealed the District Court's granting of defendants pre-trial motion to suppress to the United States Court of Appeals for the Seventh Circuit. The sole issue on appeal was whether the District Court erred in finding that the warrantless search of the sealed container (to-wit: the brown paper bag wrapped tightly with fibrous tape within another brown paper bag) did not fall within the purview of the automobile inventory search exception to the warrant requirement.

The Court of Appeals, in a 2 to 1 decision, reversed the Order of the United States District Court for the Northern District of Indiana, which had granted defendant's motion to suppress the introduction into evidence of the 805 grams of phencycledine. The majority concluded that Trooper Hostetter commenced a proper warrantless inventory search of the vehicle's interior and that current law, to-wit: *South Dakota* v. *Opperman,* 428 U.S. 364 (1976) and *Illinois* v. *Lafayette,* ____ U.S. ____ 103 S.Ct. 2605 (1983) authorized the search of sealed containers found during the inventory. The dissenting opinion agreed that these two cases allowed an inventory search of a lawfully impounded vehicle and of all sealed containers found during that search but found that these cases mandate that the government demonstrate that the search was performed "in accordance with established inventory procedures." (App. A). The dissenting opinion, agreed with the District Court Judge in finding that, among other things, the search was not performed in accordance with established inventory procedures and thus was invalid under *South Dakota* v. *Opperman, supra,* and *Illinois* v. *Lafayette, supra.*

REASONS FOR GRANTING THE PETITION

1. ***South Dakota* v. *Opperman* and *Illinois* v. *Lafayette's* approval of a routine inventory search does not justify the warrantless search of a sealed container found in a closed compartment of an impounded automobile.**

The Court of Appeals, in its opinion, relied almost exclusively on the cases of *South Dakota* v. *Opperman, supra,* and *Illinois* v. *Lafayette, supra,* in arguing that the police officer's actions in searching the sealed and secured package were legitimate functions in a routine inventory search of an impounded automobile. Petitioners contend, however, that these cases do not provide direct authority for the Court of Appeals decision and urge this Court to settle this case. Additionally, the decision of the Court of Appeals conflicts with decisions of other Federal District Courts and Courts of Appeal on the same issue, to-wit: whether a routine inventory search allows the inspection of sealed packages found within the impounded vehicle.

The inventory in *Opperman* did not involve the inspection of containers or sealed packages found within the impounded vehicle. The District Court, in the case at bar, found that the package in the Griffin vehicle was a plastic bag which was enclosed in opaque paper. The paper was wrapped securely with strong, fibrous tape and that secured package was placed in a brown paper bag which was deposited within the covered storage compartment. (App. B, p. 44-A); (See transcript p. 87, line 16-25). In fact, the police officer had to tear the package open at a spot on the end of the package where the tape was not present in order to ascertain its contents. (TR 88). In *Opperman,* Jutice Powell, in a concurring opinion, specifically stated "upholding searches of this type provides no general license for police to examine all the contents of such automobiles." 428 U.S. 379-80. In analyzing the impact of the *Opperman* decision, the dissenting Justices in that case noted,

"the Court's opinion does not authorize the inspection of suitcases, boxes or other containers which might themselves be sealed, removed or secured without further intrusion" *Id.* at 388 N 1.

Subsequent to the decision in *Opperman*, numerous courts have had an opportunity to decide the question of whether sealed containers found within a legally detained vehicle can be opened and inventoried pursuant to *Opperman*. These cases have found that a police officer's custody of an impounded vehicle does not divest the owners of privacy expectations relating to sealed containers found within the vehicle. *United States* v. *Jackson,* 529 F. Supp. 1047, 1053 (D.M. 1981). *Also, United States* v. *Wilson,* 636 F.2d 1161, 1164-66 (8th Cir. 1980) (The search of a locked trunk found within a legally detained vehicle held to be invalid); *United States* v. *Miller,* 608 F.2d 1089, 1101 (5th Cir. 1979) (Search of a portfolio found within a legally detained vehicle held to be invalid); *United States* v. *Bloomfield,* 594 F.2d 1200, 1201-03 (8th Cir. 1979) (Search of a closed and tightly sealed knapsack found within a legally detained vehicle held to be invalid); *United States v. Hill, 458 F. Supp. 31, 33-37 (D.D.C. 1978) (Search of a flight bag found within a legally detained vehicle held to be invalid).*

The District Court below, also considered whether there could be a legitimate privacy interest present in a tightly secured package within the brown paper bag. Citing *United States* v. *Ross* (456 U.S. 798, 102 S.Ct. 2157, 72 L.E.2d 572, 579, the District Court noted that there was a privacy expectation in the Griffin package.

> "A constitutional distinction between 'worthy' and 'unworthy' containers would be improper. Even though such a destination perhaps could evolve in a series of cases in which *paper bags,* locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of

> privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a *paper bag* or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophistocated executive with a locked attache case. (Footnotes omitted) (Emphasis added).

From the foregoing, it is clear that *South Dakota* v. *Opperman* provided authority for the inventory search of the impounded Griffin vehicle but that it does not provide authority for search of the secured package found within the storage compartment of the automobile.

The Court of Appeals next relied upon the opinion in *Illinois* v. *Lafayette, supra,* as authority for the Troopers tearing open and examining of the sealed, secured package found in the Griffin vehicle. The petitioners would contend that *Illinois* v. *Lafayette* is distinguishable for several reasons. First the decision in *Lafayette* presents a rather narrow question, to-wit: "The question presented is whether, at the time an arrested person arrives at a police station, the police may, without obtaining a warrant, search a shoulder bag carried by that person. *Id.* 77 L.E.2d 65, 68. In the *Lafayette* case it was simply the shoulder bag that was being inventoried while in this case it was an automobile. It was the sealed container found within that automobile that was torn open and searched. The wrapped package was such that it was equivalent to being locked. The shoulder bag in *Lafayette* was not locked and was easily opened. In fact, it could be argued that the shoulder bag in *Lafayette* is equivalent to the car in Griffin or the unlocked storage compartment in the Griffin automobile where the subject package was ultimately found. The petitioners feel that the case at bar presents a different issue in that there was a sealed and secured package found within the unlocked compartment found within the automobile and that this is distinguishable from the unlocked shoulder bag in *Lafayette.* In effect, the Griffin package is a sealed package within an unsealed package (to-wit: the brown paper bag), within a

container (to-wit: the unlocked storage compartment) within an automobile. *Opperman* and *Lafayette* give law enforcement authorities the power to inventory the automobile, the unlocked storage compartment and the paper bag, but we do not feel that they provide authority to tear into the sealed secured package found within. For these reasons we feel that the decision of the Court of Appeals should be reviewed by this Court.

2. The majority opinion of the Court of Appeals contravened a ruling precedent of this Court in failing to hold and failing to find that the search in question was not performed in accordance with established inventory procedures.

The cases of *South Dakota* v. *Opperman, supra* and *Illinois* v. *Lafayette, supra,* require that inventory searches must be performed in accordance with established inventory procedures. In his dissenting opinion below, Judge Eschbaugh correctly points out that the justification for inventory searches has been that such searches are in accordance with standardized procedure and do not leave the search to the absolute discretion of the searching officer. The dissenting opinion further points out:

. . .

"As the Ninth Circuit noted in *United States* v. *Hellman,* 556 F2d 442 (1977) '[a] locally followed practice gives some assurance that a particular car was not singled out for special searching attention.' *Id* at 444; *See, Generally* 2 *W LaFave, Search and Seizure 'A Treatise on the Fourth Amendment'* Section 7.4 at 576-77 (1978). Indeed Justice Powell, whose vote was needed for a majority in *Opperman,* finds inventory searches reasonable because "no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search *or its scope.*" *South Dakota* v. *Opperman,* 428 U.S. at 384 (Powell, J. concurring) (Emphasis added).

"Appendix A at page 25.

In the case at bar, the standard inventory procedures as found by the district court were not followed by Trooper Hostetter. (App. A. Pg. 24). Trooper Hostetter was supposed to conduct an inventory search prior to the vehicle being towed away, which he did. However, after the vehicle was towed Trooper Hostetter renewed his search and opened the wrapped package. (App. A. Pg. 24). As is pointed out by the majority in the Court of Appeals, Hostetter had discovered the wrapped package during his prior search of the vehicle and had noted its characteristics. Thus, Hostetter exceeded the stated departmental policy of the Indiana State Police.

. . .

> [T]he government must prove that such a search was truly inventorial, and not investigative. In other words, the government must establish that the search was performed "in accordance with established inventory procedures". [*Illinois v. Lafayette,* 103 S.Ct. 2605 at 2611;] *See, South Dakota v. Opperman,* 428 U.S. at 372. Absent proof of compliance with settled inventory rules, evidence seized during the search must be suppressed. *See, e.g., State v. Jewell,* 338, So.2d 633 (LA 1976); *State v. Blais,* 416 A.2d 1253 (ME. 1980).
>
> Appendix A at Page 23-24. Eschbaugh, J. dissenting.

Pursuant to the authority of *Opperman* and *Lafayette,* this Court should review this case because the government failed to demonstrate that the search was performed in accordance with established inventory procedures which defined the subject of the search and its scope. The only evidence elicited by the government at trial was that the inventory of the car was a standard practice before towing. (TR 81). However, the Trooper admitted his ignorance with regard to written rules that might have been in effect implementing the towing and impounding policy and the inventory policy. (TR 81-82). No other evidence was forthcoming from the government. In fact, Trooper Hostetter testified that with regard to written rules

implementing those policies that "[I] should of maybe taken the time to read it." (TR. 82). Not only is there a lack of evidence of standard and formal guidelines, but it is apparent that from the slim evidence presented that the search exceeded that standard. This Court needs to reaffirm that inventory searches are tolerated only if they are conducted in accordance with established and settled rules and procedures. Therefore this Court should grant review.

3. The Majority Opinion of the Court of Appeals Contravened Ruling Precedent of This Court and Thus Erred in Failing to Find That There Was Inadequate Evidence of a "Standardized Procedure" Which Was Followed and Which Took the Search Out of the Absolute Discretion of the Officer.

The District Court found that the government had not shown the existence of any formal guideline or regulation promulgated by the State government or the police agency which defined the permissible scopes of Trooper Hostetter's search. (App. B at Pg. 27). In dealing with the District Court's finding, the majority in the Court of Appeals stated:

> . . .
>
> The district court's mention of the lack of a formal guideline or regulation defining the permissible scope of an automobile inventory search appears to be a new and novel theory to further restrict law enforement procedures under the guise of constitutional interpretation . . .
>
> (App. A at P. 13 N. 10).

Though the government did show—albeit vaguely—that the inventory of the car was a standard practice before towing, the police officer admitted that he could not testify as to any regulations regarding the procedures to be employed in such a situation. (TR 81). There was no other evidence forthcoming. In *Opperman* the inventory was conducted strickly in accordance with the regulations of the police department and these regulations were such as to guard against arbitrariness in such

that they insured that the intrusion would be limited in scope to the extent necessary to carry out the caretaker function. *Opperman* 428 U.S. at P. 380. In fact, in *Opperman,* there was evidence of a specific nature concerning the regulations of the police department. In the present case, as the District Court found, there was absolutely no evidence of what the applicable standard police caretaking procedures might of been and the evidence reflects that the decision to search the car again after it had been towed exceeded what evidence there was concerning the policy and was left to the arbitrary discretion of the police officer. Even if the bare evidence that was presented by the government could support the finding of a standardized procedure, we have a situation where the police officer, himself, admits he is unfamiliar with the rules and regulations that allows him to impound and search the vehicle. Thus, even if this standard cited by the majority is sufficient, the Trooper's ignorance of the rules and regulations make them virtually meaningless, and the search would appear to have been left to the absolute discretion of the officer. For these reasons this Court should review the decision of the Court of Appeals.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Jerrald A. Crowell
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APPENDICES

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-1523

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CHARLES E. GRIFFIN and JEROME GRIFFIN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 82 CR 25—William C. Lee, *Judge.*

ARGUED SEPTEMBER 27, 1983—DECIDED FEBRUARY 28, 1984

Before BAUER, ESCHBACH, and COFFEY, *Circuit Judges.*

COFFEY, *Circuit Judge.* The Government appeals the order of the United States District Court for the Northern District of Indiana, granting defendants' Motion to Suppress the introduction into evidence of 805 grams of phencyclidine. We reverse.

I

The evidence at the motion to suppress hearing revealed that on December 2, 1982, at approximately 5:30 p.m., Indiana State Trooper Zimmerman spotted a speeding 1982 Corvette on the Indiana Toll Road. Zimmerman, whose roof-mounted lights were not functioning, motioned the

driver to pull off the roadway by shining a spotlight on the rear window of the vehicle, but the driver responded by speeding away. Zimmerman radioed a general description of the Corvette to other officers in the area, but was unable to provide a license number as the license plates were too dirty to discern. Soon thereafter, a toll road attendant radioed that a silver Corvette, answering Officer Zimmerman's description, had exited the Indiana Toll Road at the Middleberry exit. Approximately one-half hour later the attendant radioed that the same vehicle had returned to the toll road but that the license plates remained unidentifiable. After hearing the attendant's description of the Corvette over his police radio, Indiana State Trooper Kensil radioed officers in the area that three months earlier he had stopped a silver Corvette traveling 134 m.p.h. on the Indiana Toll Road. Kensil supplied the officers with the California license number of the vehicle he had stopped and identified the driver as a Charles Griffin of Gary, Indiana.

Indiana State Trooper Hostetter, who was monitoring his radio and patrolling the Indiana Toll Road on the evening of December 2, 1982, positioned himself in the emergency lane of the roadway in order to observe the oncoming Corvette. As the vehicle passed the squad car's position, Hostetter pulled onto the roadway and followed the Corvette but was unable to determine the license number due to the dirty license plates. Concerned that this Corvette might be the same one that had previously eluded Officer Zimmerman, Hostetter continued to follow closely. Once the Corvette approached the proximity of other state troopers positioned along the roadway, Hostetter flashed his roof-mounted lights and the driver of the Corvette pulled into the emergency lane of the toll road.

Officer Hostetter approached the Corvette and informed the driver that he had been stopped for an "improperly displayed registration" (unidentifiable license plate). Hostetter asked the driver for his operator's license and vehicle registration but the driver was unable to produce

either document. Hostetter then asked for any form of identification and the driver handed Hostetter an "Illinois identification card" with the name Jerome Griffin inscribed thereon. Hostetter instructed Jerome Griffin to exit the 1982 Corvette and join him in the squad car, and while there, Jerome stated that he had no valid Illinois driver's license, only an expired California driver's license. Hostetter advised Jerome that he would receive a warning for the improperly displayed registration but that he would be cited for failing to possess a valid operator's license. When informed that the fine for operating an automobile without a valid license was between $40.00 and $50.00, Jerome asked for and was given permission to borrow the money needed to pay his fine from his cousin Charles Griffin, the passenger.

During the period that Hostetter was questioning Jerome Griffin, Officer Nufer observed that the 1982 silver Corvette had a California license number identical to that of the Corvette stopped by Officer Kensil some three months earlier on the Indiana Toll Road. When the passenger of the vehicle presented Nufer with a valid Indiana driver's license in the name of Charles Griffin, Nufer identified Charles as the driver of the Corvette that had been ticketed three months earlier for travelling 134 m.p.h. on the Indiana Toll Road. Nufer ran a routine check on Charles Griffin in Lake County, Indiana, Charles's county of residence, and learned that an outstanding bench warrant existed for Charles's failure to appear in court on October 8, 1982, for an unrelated traffic violation. Based upon this information, Nufer arrested Charles Griffin and placed him in custody.

Jerome Griffin obtained the cash needed to pay his fine from Charles, and then informed Charles that the Indiana State Police were going to impound the Corvette because neither Jerome, who had no valid driver's license, nor Charles, who was under arrest, could lawfully remove the vehicle from the toll road. Charles objected and suggested that the vehicle remain parked in the emergency lane of the roadway until Charles's girlfriend arrived to drive it

back to Gary, Indiana.[1] Officer Hostetter refused to leave the automobile on the side of the well-traveled Indiana Toll Road due to the danger it presented to passing nighttime motorists and the high incidence of theft inherent in a late model sports car such as a 1982 Corvette. Hostetter also recalled a previous incident wherein an officer allowed alleged friends of a driver to remove the driver's automobile from the highway and the friends decided to steal the automobile. Rather than expose himself or the Indiana State Police Department to unwarranted liability, by allowing an unknown third party to remove a vehicle whose ownership had not yet been determined,[2] Hostetter followed the "standard operating procedure" of the Indiana State Police Department and impounded the vehicle.

Hostetter directed Jerome Griffin to lock the Corvette and the two of them proceeded to the courthouse in Fremont, Indiana, while Nufer began his portion of the westbound relay of Charles Griffin to Lake County, Indiana.[3] In the Fremont court, Jerome pleaded guilty to the charge of failing to possess a valid operator's license and paid the statutory fine and costs. During Jerome's court appearance, Roger Fulton arrived at the courthouse in response to Hostetter's request that the towing service provide a driver to remove the Corvette from the Indiana

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[1] According to the district court's findings of fact, "even if Charles Griffin's girlfriend left immediately it would take over four hours to reach the site of the Corvette."

[2] According to the district court's findings of fact, "[a]lthough the name of the actual owner, Cleota Griffin, may have been confirmed, his exact relationship to Jerome and Charles Griffin was not" established until the motion to suppress hearing, some four months after the incident in question.

[3] Officer Hostetter testified that Charles Griffin was "relayed" to Lake County, Indiana. This simply means that the Indiana State troopers transported Charles Griffin, within their respective areas of patrol duty, from one westbound police car to another until the final vehicle arrived in Lake County, Indiana.

Toll Road. It was standard procedure to allow the towing service to drive a Corvette, rather than tow it, due to the possibility that towing might damage the sports car's transmission and/or fiberglass body.[4]

Before driving Fulton to the location of the Corvette, Hostetter offered to arrange for a westbound bus to transport Jerome Griffin back to Gary, Indiana. Jerome accepted the offer but requested permission to accompany Hostetter and Fulton to the Corvette in order that he might retrieve his apartment keys. During the trip from the courthouse to the Corvette, Jerome gave his automobile keys to Fulton pursuant to Hostetter's instructions. When the three of them arrived at the vehicle, Fulton unlocked the driver's door and allowed Jerome to search for his apartment keys. Officer Hostetter next instructed Jerome to unlock the passenger's door so that Hostetter could assist Jerome in his search for the keys and begin the routine inventory search of the vehicle.[5] While checking for the presence of valuables, Hostetter reached into the open area behind the passenger's seat of the two-seat vehicle and removed the lid from an unlocked storage compartment. Hostetter observed two hand guns within the compartment and replaced the storage lid. Hostetter next searched the elasticized map pouch in the passenger door, found Jerome's apartment keys therein, and returned the same to Jerome.

Following the discovery of Jerome's keys, Hostetter checked the revolvers to determine if they were loaded. He observed that ammunition clips were in the weapons

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[4] According to the district court's findings of fact, this procedure "protected the interest of the troopers, the tow service, and the owner of the Corvette."

[5] According to the district court's findings of fact, "it was standard practice for state troopers to routinely undertake the inventory of such vehicles pursuant to a departmental policy which required that all impounded vehicles be searched prior to being towed or driven away by the towing service."

and also that an unsecured brown paper bag was lying beneath the two revolvers in the unlocked storage compartment. Hostetter removed the unsecured brown paper bag from the compartment and immediately detected an unusual odor emanating from the bag. Hostetter opened the unsecured brown paper bag, and within the bag discovered a package wrapped in brown paper and secured with fibrous plastic tape. Rather than opening the package at that time, Hostetter placed the package back inside the brown paper bag, returned the bag and the revolvers to the compartment, and instructed Fulton to drive the Corvette to a maintenance area located "about two miles" down the highway. Jerome Griffin joined Hostetter in the police car and the two of them followed Fulton to the maintenance area that also served as a gasoline service station for the Indiana State Police Department.

Once at the maintenance area, Hostetter ran a routine check on the two revolvers with his command post but received no information on either revolver. As Hostetter continued to inventory and secure the items contained within the Corvette, he removed the unsecured brown paper bag from the storage compartment and became "suspicious" of its contents. Hostetter had no knowledge of what the brown paper bag contained but decided that for purposes of his inventory, he must itemize the bag's contents as he was "responsible for what [was] in it." Hostetter removed the tape wrapped package from the brown paper bag and opened an end portion, unsecured by tape, "to see what was in it to put down on [his] inventory." Hostetter observed a yellow substance in a clear plastic bag but did not open the plastic bag, instead he radioed Officer Nufer to join him at the maintenance area. Nufer, who had completed his portion of the westbound relay of Charles Griffin to Lake County, Indiana, arrived at the maintenance area and after observing the yellow substance contained within the sealed, clear plastic bag, informed Hostetter that he believed the package contained a controlled substance. The Indiana State Police lab later analyzed the contents of this clear plastic bag and iden-

tified the yellow substance as 805 grams of phencycledine, a Schedule II controlled substance.

On December 3, 1982, Charles and Jerome Griffin were charged with unlawful possession with the intent to distribute 805 grams of phencycledine in violation of 21 U.S.C. § 841(a)(1) (1982). The defendants moved to suppress the introduction of the phencycledine into evidence on the grounds that it was obtained without a valid search warrant. The district court granted defendants' pre-trial Motion to Suppress, ruling that the warrantless search did not fall within any of the recognized exceptions to the warrant requirement, including a search incident to an arrest, an automobile inventory, the automobile exception, or plain view, and therefore, was invalid. The sole issue on appeal is whether the district court erred in finding that the warrantless search of the 1982 Corvette did not constitute a proper automobile inventory search.

II

In reviewing the district court's ruling that Officer Hostetter's search of the impounded 1982 Corvette did not constitute a proper automobile inventory search, we initially note the district court's finding that:

> "[C]redible testimony established that Trooper Hostetter took custody of an expensive sports car which would have been otherwise left unattended, possibly for an extended period, in close proximity to the traveled portion of a busy, high speed roadway. There was also a danger to other motorists, along with the need to protect the state from civil liability based upon unfounded property claims for lost or stolen items. Adopting these determinations, *the court must conclude that Hostetter's [impoundment] was justified and that based on these considerations, substantially similar to those underlying the premise in [South Dakota v. Opperman,* 428 U.S. 364 (1976)*], the initiation of the subsequent routine inventory search was reasonable and therefore consistent with*

> *the constitutional commands and guarantees of the Fourth Amendment.* 428 U.S. at 368-71." (footnote omitted) (emphasis added).

The evidence presented at the motion to suppress hearing, and the case law applicable thereto, provides more than ample support for the district court's findings that Indiana State Trooper Hostetter's impoundment of the 1982 Corvette was proper and that his initiation of a routine inventory search, without a warrant, was reasonable and thus consistent with the Fourth Amendment.

The record reveals that Charles and Jerome Griffin at no time presented Officer Hostetter with documentary proof of ownership of the 1982 Corvette. In addition, the driver of the 1982 Corvette, Jerome Griffin, had no valid driver's license, and the passenger, Charles Griffin, was under arrest and being transported back to Lake County, Indiana, to answer for an outstanding bench warrant. Thus, neither Charles nor Jerome could lawfully remove the vehicle from its parked position in the emergency lane of the Indiana Toll Road. In such a situation, Officer Hostetter's decision to direct the removal of the Corvette from the heavily traveled, high speed roadway was an act of good judgment in the interest of public safety, as the vehicle presented a hazard to passing nighttime motorists. *See, e.g., South Dakota v. Opperman,* 428 U.S. 364, 368-69 (1976) ("*Opperman*"); *Cady v. Dombrowski,* 413 U.S. 433, 443 (1973) ("*Cady*"). Furthermore, by removing the Corvette from the roadway, Hostetter protected the expensive 1982 sports car and its contents from the likelihood of damage, theft, and vandalism. *See, e.g., United States v. Staller,* 616 F.2d 1284, 1290 (5th Cir.), *cert. denied,* 449 U.S. 869 (1980); *United States v. Balanow,* 528 F.2d 923, 924 (7th Cir. 1976). The impounding of the vehicle was part of Officer Hostetter's "community caretaking function[ ], totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady,* 413 U.S. at 441. Indeed the impounding of an automobile has been upheld as proper when the automobile is in violation of a parking ordinance,

see Opperman, 428 U.S. at 365-66; a state forfeiture statute applies, *see Cooper v. California*, 386 U.S. 58, 61 (1967); the driver is incapacitated, *see Cady*, 413 U.S. at 436; the driver's operator's license is suspended, *see United States v. Balanow*, 528 F.2d at 924. In this instance, the Corvette presented a potential hazard to passing nighttime motorists and neither Charles nor Jerome Griffin could lawfully remove the vehicle from its illegally parked position in the emergency lane of the Indiana Toll Road. Officer Hostetter's decision to impound the 1982 sports car was certainly proper for "[t]he authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." *Opperman*, 428 U.S. at 369. *See also* Ind. Code § 9-4-1-113 (1976).[6]

Before removing the vehicle from the heavily traveled toll road, Hostetter commenced a warrantless inventory search of the vehicle's interior. The fact that Hostetter obtained no search warrant before initiating the automobile inventory search is totally consistent with current law that provides: "the inventory search constitutes a well-defined exception to the warrant requirement." *Illinois v. Lafayette*, 103 S. Ct. 2605, 2608 (1983) ("*Lafayette*"). As the Court in *Opperman* noted, "[t]he Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only *unreasonable* searches and seizures." (emphasis original) 428 U.S. at

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[6] Ind. Code § 9-4-1-113 provides in pertinent part:

"(a) Whenever any police officer finds a vehicle standing upon a highway in violation of any of the provisions of this chapter, such officer is hereby authorized to require the driver or other person in charge of the vehicle to move the same, to a position off the paved or improved or main traveled part of such highway, provided that if any person so directed shall fail or refuse to move said vehicle or if such vehicle is unattended then such officer is hereby authorized to provide for the removal of such vehicle to the nearest available garage or other place of safety."

372-73 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 509 (1971) (Black, J., concurring and dissenting)). Moreover, "[i]n applying the reasonableness standard adopted by the Framers, [the] Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents." *Opperman*, 428 U.S. at 373. Thus, the justification for an inventory search "does not rest on probable cause and . . . the absence of a warrant is immaterial to the reasonableness of the search." *Lafayette*, 103 S. Ct. at 2608.[7]

In conducting the automobile inventory search of the lawfully impounded 1982 Corvette, Officer Hostetter testified that he was following the "standard operating procedure" for the Indiana State Police Department. According to the Court in *Opperman*:

> "When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. *These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger.*" (citations omitted) (emphasis added).

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[7] The fact that an inventory search is not premised upon probable cause distinguishes the inventory search of an automobile, and the packages contained therein, from the warrantless search of an automobile where probable cause for the search exists in the first instance. Thus, the United States Supreme Court's rationale in the line of cases dealing with the warrantless search of an automobile, where probable cause for the search exists in the first instance, *see, e.g., United States v. Ross*, 456 U.S. 798 (1982); *Robbins v. California*, 453 U.S. 420 (1981); *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977); and *Carroll v. United States*, 267 U.S. 132 (1925), is inapplicable to a case involving an automobile inventory search. *See United States v. Chadwick*, 433 U.S. at 10 n.5; *United States v. Laing*, 708 F.2d 1568, 1571 (11th Cir. 1982).

428 U.S. at 369. *See also United States v. Maier*, 691 F.2d 421, 423 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1433 (1983); *United States v. Dall*, 608 F.2d 910, 914 (1st Cir. 1979), *cert. denied*, 445 U.S. 918 (1980). When the automobile inventory search is carried out "in accordance with *standard procedures* in the local police department, [it] . . . tend[s] to ensure that the intrusion [is] limited in scope to the extent necessary to carry out the caretaking function." (emphasis original) *Opperman*, 428 U.S. at 375. In this instance, Officer Hostetter's statement, that the automobile inventory search was carried out in accord with the "standard operating procedures" of the Indiana State Police Department, is supported by the district court's finding of fact that "it was standard practice for state troopers to routinely undertake the inventory of such vehicles pursuant to a departmental policy which required that all impounded vehicles be searched prior to being towed or driven away by the towing service." Officer Hostetter's statement finds further support in this court's decision in *United States v. Balanow*, 528 F.2d 923 (7th Cir. 1976) ("*Balanow*"), where, just as in this case, an Indiana State trooper conducted an inventory search of an automobile that was impounded due to the driver's inability to present a valid operator's license. In holding that the inventory search was reasonable, this court stated that, "*[u]nder normal [Indiana] state procedure, defendant's car was searched at the time of impounding.* The police had a right to inventory the contents of the impounded car." (emphasis added). *Balanow*, 528 F.2d at 924. Thus, Hostetter's decision to conduct an inventory search of the Corvette in order to protect the Griffins' property from damage, theft, and vandalism while in the custody of the Indiana State Police, to protect the Indiana State Police and the towing service against claims of lost or stolen property, and finally, to protect himself and other Indiana State Police officers from potential

danger,[8] was standard operating procedure for the Indiana State Police Department and therefore reasonable.[9] *Accord Opperman*, 428 U.S. at 373. Based upon the evidence presented at the motion to suppress hearing, we agree with the district court and hold that Officer Hostetter properly impounded the 1982 Corvette and in accord with the "standard operating procedures" of the Indiana State Police Department, engaged in a routine, caretaking inventory search of the automobile. *See Opperman*, 428 U.S. at 375; *Cady*, 413 U.S. at 436. Moreover, in response to the Griffins' claim that the inventory search was nothing more than a pretext for an unlawful investigatory search the district court "remain[ed] unpersuaded that Trooper Hostetter undertook the inventory search as a subterfuge for an investigatory search." Upon our independent review of the record, we agree with the district court's finding that Officer Hostetter's inventory search was not a pretext for an unlawful investigatory search.

We next consider whether the district court erred in finding that:

> "[A]lthough Trooper Hostetter had the right to search the vehicle and retain the bag, for the purpose identified in *Opperman*, . . . the maintenance of [sic] privacy expectation superior to the governmental interests articulated precludes the use of the

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[8] The United States Supreme Court in *Lafayette* identified these potential dangers when it stated that "[d]angerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent looking articles." 103 S. Ct. at 2609.

[9] Officer Hostetter testified that:

> "[W]hen I take a car in for protective custody or to impound it I inventory that vehicle because our [sic] standard operating procedure
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> * * *
>
> It protects Roger Fulton who took the car in to put in his garage, protects me and protects the Griffins if something is taken."

inventory exception to authorize the opening of either the bag or the tape-wrapped package within."[10]

In sum, we must determine whether the scope of Hostetter's automobile inventory search was "reasonable" and

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[10] The district court also relied upon "the absence of standard procedures regulating the scope of [the] search" to rule that Officer Hostetter's search of the lawfully impounded 1982 Corvette did not constitute a proper automobile inventory search. In light of Officer Hostetter's testimony that the inventory of impounded vehicles is "standard operating procedure" of the Indiana State Police Department, the district court's finding of the same, and this court's language in *Balanow* that normal Indiana procedure allows state troopers to perform an automobile inventory search at the time of impounding, we fail to understand the district court's concern over the Government's failure to show "the existence of any formal guideline or regulation defining the permissible scope of the trooper's search." The district court's attempt to distinguish the *scope* of the "standard operating procedure" used by the Indiana State Police and the one used by the Vermillion Police Department which was upheld by the Court in *Opperman* is without merit. In his concurrence in *Opperman*, Justice Powell noted that the "standard inventory" of the Vermillion Police Department "consist[ed] of a survey of the vehicle's exterior—windows, fenders, trunk, and hood—apparently for damage, and its interior to locate 'valuables' for storage." *Opperman*, 428 U.S. at 380 n.6 (Powell, J., concurring). There exists no mention in *Opperman* of the scope of the inventory search once inside the interior of the vehicle. For this reason the district court's reliance upon the lack of a formal guideline or regulation defining the permissible scope of Hostetter's inventory search, once inside the automobile, is completely misplaced. In fact, it appears that the Indiana State Police Department's "standard operating procedure" is "essentially like that followed throughout the country," *Opperman*, 428 U.S. at 376, for the inventory search of an automobile.

The district court's mention of the lack of a formal guideline or regulation defining the permissible scope of an automobile inventory search appears to be a new and novel theory to further restrict law enforcement procedures under the guise of constitutional interpretation. We agree with the Court in *Lafayette* that, "[w]e are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse." *Lafayette*, 103 S. Ct. at 2610.

thus within the confines of the Fourth Amendment. "As always, the reasonableness of [an] inventory search depends upon the particular facts and circumstances." *United States v. Laing*, 708 F.2d at 1571 (citing *United States v. Edwards*, 577 F.2d 883, 893 (5th Cir.), *cert. denied*, 439 U.S. 968 (1978)). To determine the reasonableness of an inventory search, we must "balanc[e] its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests." *Lafayette*, 103 S. Ct. at 2608 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). Of course, a routine automobile inventory search must be limited to the purposes for which it was effectuated. *United States v. Prescott*, 599 F.2d 103, 105 (5th Cir. 1979). *See also United States v. Bosby*, 675 F.2d 1174, 1179 (11th Cir. 1982); *United States v. Jackson*, 529 F. Supp. 1047, 1053 (D. Md. 1981). In this instance, those purposes, which also constitute the legitimate governmental interests, include protecting the Griffins' property from damage, theft, and vandalism while in the custody of the Indiana State Police, protecting the Indiana State Police and the towing service against claims of lost or stolen property, and protecting Hostetter and other Indiana State Police officers from potential danger. *See Opperman*, 428 U.S. at 369. We balance these legitimate governmental interests against Charles and Jerome Griffins' expectation of privacy in a tape wrapped package placed in an unsecured brown paper bag and located in the unlocked storage compartment of an automobile that neither Charles nor Jerome owned.[11]

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[11] Despite the fact that neither Charles nor Jerome Griffin owned or had a property interest in the 1982 Corvette in which 805 grams of phencyclidine were found, both defendants had a legitimate expectation of privacy in the vehicle. According to the district court's findings of fact, Charles Griffin's close relative, his brother Cleota Griffin, owned the Corvette and with Cleota's permission, Charles and Jerome were exercising exclusive control over the vehicle on the evening of December 2, 1982. Thus, Charles and Jerome Griffin had standing to claim that the inventory search of the 1982 Corvette violated their privacy rights under the Fourth Amendment.

(Footnote continued on following page)

No. 83-1523

We initially note that "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Opperman*, 428 U.S. at 367. *Accord United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). As the Court in *Opperman* stated:

> "In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." (citation omitted).

428 U.S. at 367-68. *See also Cady*, 413 U.S. at 441.[12] In this light we first consider whether it was reasonable for Officer Hostetter to open the unlocked lid of the recessed compartment behind the passenger's seat. On this issue we believe the decision in *Opperman*, where the Court upheld an inventory search of the contents of the unlocked glove compartment of an abandoned automobile, lawfully impounded by the police, to be dispositive. As the Court in *Opperman* stated:

> "The inventory was not unreasonable in scope. . . . [O]nce the policeman was lawfully inside the car to secure the personal property in plain view, it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the car."

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[11] *continued*

See United States v. Posey, 663 F.2d 37, 41 (7th Cir. 1981), *cert. denied*, 455 U.S. 959 (1982) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)).

[12] We realize, of course, that even though the expectation of privacy is "significantly less" in an automobile, a reasonable expectation of privacy can exist with regard to the contents of that automobile. *See United States v. Wilson*, 636 F.2d 1161, 1163 (8th Cir. 1980); *United States v. Jackson*, 529 F. Supp. at 1053.

428 U.S. at 376 n.10. Just as the unlocked glove compartment in *Opperman* was a "customary place . . . for the temporary storage of valuables," 428 U.S. at 372, so too, in this instance, the unlocked recessed compartment behind the passenger's seat of the Corvette was an ideal place for the temporary storage of valuables. Thus, in furtherance of the legitimate governmental interests of protecting the vehicle and its contents from damage or theft, and protecting members of the Indiana State Police Department from liability and potential danger, we hold that it was reasonable for Officer Hostetter to open the unmarked lid of the recessed storage compartment. *Accord Cady*, 413 U.S. at 448 (the inventory search of an automobile trunk upheld as reasonable); *Cooper v. California*, 386 U.S. at 62 (the inventory search of a glove compartment upheld as reasonable).

We next consider whether it was reasonable for Officer Hostetter to remove the unsecured brown paper bag from the compartment, retrieve from that bag a package wrapped in brown paper and secured with fibrous tape, and then open an unsecured end of that package. It is undisputed that once Hostetter observed the two revolvers in the recessed storage compartment and the brown bag lying beneath them, he was entitled to remove the revolvers and the bag in order to properly inventory and secure the items. The district court took issue, however, with Hostetter's next move, namely his retrieval and inspection of the tape wrapped package contained within the unsecured brown paper bag. According to the district court, Charles and Jerome Griffin had a reasonable expectation of privacy in the unsecured brown paper bag, and Hostetter, rather than opening the bag, should have simply inventoried "one brown bag." In the alternative, the district court concluded that even if it was proper for Officer Hostetter to retrieve the tape wrapped package from the brown paper bag, there was no reason for opening an unsecured end of that package; instead Hostetter could have inventoried "one tape wrapped package." *See, e.g., United States v. Bloomfield*, 594 F.2d 1200, 1203 (8th

Cir. 1979) ("*Bloomfield*") (the inventory search of the contents of a zipped knapsack, tied with string, and contained within an automobile, held to be unreasonable). Despite the closeness of this issue, a review of the record and recent case law convinces this court that the district court improperly balanced the Griffins' expectation of privacy in the tape wrapped package contained within the unsecured brown paper bag, against the legitimate governmental interests involved in an inventory search.

In the instant case, the brown paper bag was not secured and thus its unknown contents could have fallen out and been misplaced, lost, or even stolen. (We know from various cases that 805 grams of phencycledine has a street value in excess of ten thousand dollars.) Officer Hostetter's decision to inventory and secure each and every item contained within the Corvette, including the contents of the unsecured brown paper bag, protected the bag's contents from falling out and being lost. As the court in *Bloomfield* stated, "[i]f a container which is to be inventoried is not securely closed so that the articles within could possible fall out, it may be wiser for police to itemize the articles." 594 F.2d at 1203. In addition, Officer Hostetter's decision to itemize the unknown contents of the unsecured brown paper bag allowed the Indiana State Police Department to verify the bag's contents, and thus prevent false claims of lost or stolen property. The facts in this instance closely resemble those in *United States v. Laing*, 708 F.2d 1568 (11th Cir. 1983) where a police officer, conducting a routine automobile inventory search, opened an "unusually heavy," unsecured Yahtzee box, "to see if it held anything of value that might need to be catalogued." 708 F.2d at 1571. The court held that "[t]his intrusion was justified by the purposes of an inventory search, especially the need to protect the police from claims pertaining to lost or stolen property." *Id.* It certainly was in furtherance of a legitimate governmental interest for Officer Hostetter to protect himself and the Indiana State Police Department from unwarranted liability in the event that the unsecured bag, and the

material or articles contained therein, were lost, stolen, damaged, or misplaced.

In addition, there existed a reasonable likelihood of "potential danger" in an unsecured bag placed beneath two revolvers. Officer Hostetter testified that when he retrieved the unsecured brown paper bag, he immediately detected an unusual odor. When Hostetter ran a routine check on the two revolvers with his command post, he received no information. As a result, Hostetter was "suspicious" of the bag's contents, which could have ranged from worthless sand to valuable diamonds to instrumentalities of a crime, including additional weapons, contraband, or explosives. *See, e.g., Lafayette,* 103 S. Ct. at 2609. In light of the totality of the circumstances, we hold that the legitimate governmental interests of protecting the vehicle and its contents from being damaged or lost, and protecting members of the Indiana State Police Department from liability and potential danger, outweighed the Griffins' expectation of privacy in the unsecured brown paper bag. Accordingly, it was proper for Officer Hostetter, in the course of a routine caretaking automobile inventory search, to open the unsecured brown paper bag in order to determine its contents.

Finally, we review Officer Hostetter's decision to open an unsecured end of the package contained in the brown paper bag. On this issue we believe the United States Supreme Court's reasoning in *Lafayette* to be instructive, especially in light of the Court's substantial reliance in that case, upon the same governmental interests as those present in this instance. In *Lafayette,* the defendant was arrested for disturbing the peace and was taken to the "booking room" of the police station where he removed a package of cigarettes from his shoulder bag and placed the bag on a counter. A police officer, in the course of a preincarceration inventory search, removed the contents of the shoulder bag and found ten amphetamine pills inside a cigarette case package. The Court held that the inventorying of the defendant's shoulder bag at the stationhouse, preceding incarceration, was reasonable

because it supported the legitimate governmental interest of "deter[ing] false claims [and] also inhibit[ing] theft or careless handling of articles taken from the arrested person." 103 S. Ct. at 2609. In addition, the Court noted that "[d]angerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent looking articles taken from the arrestee's possession." *Id.* The Court recognized that "prior cases amply support this conclusion" and then proceeded to discuss the holding in *Opperman*, that the automobile inventory search of a glove compartment was reasonable:

> "because it served legitimate governmental interests that outweighed the individual's privacy interests in the contents of his car. Those measures protected the owner's property while it was in the custody of the police and protected police against possible false claims of theft."

Id. at 2610.

In the instant case, Hostetter had no knowledge of what the tape wrapped package contained but did know that the package was placed beneath two revolvers and emitted an unusual odor. As a result, Hostetter was "suspicious" of the package. Hostetter opened an unsecured end of the package to determine what it contained. Hostetter testified that he opened the package only because he was "responsible for what is in it," and furthermore, he never opened the clear bag enclosed within the package. The contents of the package could have ranged from worthless sand to valuable diamonds to dangerous instrumentalities of a crime, including additional weapons, contraband, or explosives. *See, e.g., Lafayette*, 103 S. Ct. at 2609. As the court stated in *United States v. Markland*, 635 F.2d 174, 176 (2nd Cir. 1980), *cert. denied*, 451 U.S. 991 (1981) ("*Markland*"), with regard to the inventory search of a zippered thermal package thrown from an automobile in the course of an accident:

> "This does not mean, however, that [the police] officer . . . was required to take the plastic thermal

> package into his custody with a 'pig in a poke' obviousness as to its contents. *This impersonal package could have contained anything from beer to bullion or a bomb. Its contents might have been perishable, valuable, or dangerous.*" (emphasis added).

635 F.2d at 176. The court in *Markland* went on to hold that the opening of the zippered thermal package was consistent with the officer's "community caretaking function." So too, in this instance it was within Hostetter's routine "community caretaking function" to observe, examine, and inventory the contents of the tape wrapped package, an act that "not only deters false claims but also inhibits theft or careless handling of articles . . . [and uncovers] [d]angerous instrumentalities—such as razor blades, bombs, or weapons— . . . concealed in innocent looking articles." *Lafayette*, 103 S. Ct. at 2609.

According to the Court in *Lafayette*, "the need to protect against such risks arises independent of a particular officer's subjective concerns." *Id.* at 2610. Thus, in order to protect the owner's property from damage, theft, or vandalism, the police and the towing service against claims of lost or stolen property, and the police officers from potential danger, Hostetter had a duty to perform a reasonable automobile inventory search of the 1982 Corvette. In light of the totality of the circumstances, including the presence of two revolvers and an unusual odor emanating from the unsecured brown paper bag, we hold that the legitimate governmental interests involved in an inventory search outweighed the Griffins' expectation of privacy in the tape wrapped package contained within the unsecured brown paper bag. As the United States Supreme Court has held in the context of an automobile search incident to a custodial arrest:

> "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile . . . [and] may also examine the contents of any containers

> found within the passenger compartment. . . . Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."

New York v. Belton, 453 U.S. 454, 460-61 (1981). In the instant case, Officer Hostetter's lawful automobile inventory search justified the infringement of any privacy interest the Griffins may have had in a tape wrapped package contained within the passenger compartment of the 1982 Corvette. Accordingly, it was reasonable for Officer Hostetter to open the unsecured end of the tape wrapped package in the course of his routine caretaking automobile inventory search.

In so holding, we are cognizant of the fact that Hostetter could have inventoried "one brown bag" or "one tape wrapped package." The United States Supreme Court noted in *Lafayette* that the Illinois Appellate Court raised a similar argument, namely, " 'the defendant's shoulder bag could easily have been secured by sealing it within a plastic bag or box and placing it in a secured locker.' 99 Ill. App. 3d at 835, 425 N.E.2d at 1386" (citation omitted). 103 S. Ct. at 2610. The Court responded:

> "Perhaps so, but the real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps; it is not our function to write a manual on administering routine, neutral procedures of the stationhouse. Our role is to assure against violations of the Constitution.
>
> * * *
>
> In language equally applicable to this case, we held, '[t]he fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreason-

> able.' [*Cady*, 413 U.S. at 447]. *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976).
>
> * * *
>
> Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit. Only recently in *New York v. Belton*, 453 U.S. 454 (1981), we stated: '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.' " (emphasis original).

Id. at 2610-11, (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). Applying the Court's language to the instant case, the fact that Hostetter's inventory search may have been accomplished by "less intrusive" means, did not render the search unreasonable. We agree with the United States Supreme Court that "our role is to assure against violations of the Constitution" not to "write a manual on administering [the] routine, neutral procedure" of an automobile inventory search. *Lafayette*, 103 S. Ct. at 2610.

We are also aware of Justice Powell's concurrence in *Opperman* that "the *unrestrained* search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances." (emphasis added). 428 U.S. at 379-80 (Powell, J., concurring). Based upon the totality of the "facts and circumstances," *United States v. Laing*, 708 F.2d at 1571, including the Griffins' inability to produce documented proof of ownership of the 1982 Corvette, the fact that neither Charles nor Jerome could lawfully remove the vehicle from the heavily traveled Indiana Toll Road, the presence of two revolvers in an unlocked recessed compartment, and the

unusual odor emanating from the unsecured brown paper bag, we uphold Officer Hostetter's routine caretaking automobile inventory search of the lawfully impounded 1982 Corvette. *See United States v. Maier*, 691 F.2d at 423-25; *United States v. Strahan*, 674 F.2d 96, 100-01 (1st Cir.), *cert. denied*, 456 U.S. 1010 (1982). The governmental interest in protecting the Griffins' property from damage, theft, and vandalism while in the custody of the Indiana State Police, protecting the Indiana State Police and the towing service against claims of lost or stolen property, and protecting Hostetter and the Indiana State Police officers from potential danger, outweighed Charles and Jerome Griffins' expectation of privacy in a tape wrapped package placed in an unsecured brown paper bag and located in the unlocked storage compartment of an automobile that neither Charles nor Jerome owned. Accordingly we hold that Officer Hostetter's search of the lawfully impounded 1982 Corvette did constitute a proper automobile inventory search.

III

We reverse the order of the district court granting defendants' Motion to Suppress the introduction into evidence of 805 grams of phencyclidine, and remand this case for further proceedings consistent with this opinion.

ESCHBACH, *Circuit Judge*, dissenting. There can be no doubt that an inventory search of a lawfully impounded vehicle is permitted, *see South Dakota v. Opperman*, 428 U.S. 364 (1976), and containers found during the search may be opened, *see Illinois v. Lafayette*, 103 S. Ct. 2605 (1983). Nevertheless, the government must prove that such a search was truly inventorial, and not investigative. In other words, the government must demonstrate that the search was performed "in accordance with established inventory procedures." *Id.* at 2611; *see South Dakota v. Opperman*, 428 U.S. at 372. Absent proof of compliance

with settled inventory rules, evidence seized during the search must be suppressed. *See, e.g., State v. Jewell,* 338 So. 2d 633 (La. 1976); *State v. Blais,* 416 A.2d 1253 (Me. 1980).

The district court found that the Indiana State Police has a "departmental policy that all impounded vehicles be inventoried prior to being towed or driven away." This finding is based on the testimony of Trooper Hostetter who stated: "[W]hen I take a car in for protectiv[e] custody or to impound it I inventory that vehicle because our standard operating procedure I am supposed to do that. That protects the wrecker service and protects me." Indeed, in *United States v. Balanow,* 528 F.2d 923 (7th Cir. 1976), we recognized the same policy of inventorying cars before turning them over to tow-service drivers.

The uncontroverted testimony in this case reveals, however, that the standard practice was not followed. To be sure, Trooper Hostetter did ~~not~~ conduct an inventory search prior to turning the car over to Roger Fulton—the tow-service driver. In the course of that search the trooper noticed, but did not open, a package wrapped in plastic tape. Only after Roger Fulton drove the car to a maintenance area did Trooper Hostetter renew his search, open the wrapped package, and discover the phencyclidine.

If the established practice is to inventory a car *before* it is turned over to a tow-service driver, I must conclude that the search in the maintenance area was not in accord with settled procedures. Trooper Hostetter, in directing Roger Fulton to drive the car to a maintenance area, implicitly acknowledged that the roadside inventory search was adequate to protect himself and Roger Fulton. The subsequent search in the maintenance area, and the opening of what Trooper Hostetter termed a "suspicious" package, simply do not square with the routine inventory practice. To summarize, I am unaware of any Indiana State Police policy that calls for two inventory searches—one roadside search and one subsequent search to investigate "suspicious" items.

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I would thus affirm without discussing the merits of the district court's conclusion that the evidence must be suppressed because "the scope of the search appears to have been left to the absolute discretion of Trooper Hostetter." I cannot subscribe, however, to the majority's characterization of the district court's reasoning as "a new and novel theory to further restrict law enforcement procedures under the guise of constitutional interpretation." *See* Majority Opinion at 13 n.10.

As noted above, inventory searches are constitutionally permissible only if performed in accord with standardized procedures. This principle of law would be meaningless if an adequate "standardized procedure" is the commitment of absolute discretion in the searching officer. As the Ninth Circuit noted in *United States v. Hellman*, 556 F.2d 442 (1977), "[a] locally followed practice gives some assurance that a particular car was not singled out for special searching attention." *Id.* at 444; *see generally* 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.4, at 576-77 (1978). Indeed Justice Powell, whose vote was needed for a majority in *Opperman*, finds inventory searches reasonable because "no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search *or its scope.*" *South Dakota v. Opperman*, 428 U.S. at 384 (Powell, J., concurring) (emphasis added). I leave for another day the question whether the Indiana State Police's inventory policy is sufficiently specific. I need only note that the policy, as general as it is, did not sanction the trooper's actions in this case.

I respectfully dissent.

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APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of Indiana
Fort Wayne Division

UNITED STATES OF AMERICA *v.* CHARLES E. GRIFFIN and JEROME GRIFFIN	F CR 82-25

ORDER

This matter is before the Court for consideration of defendants' January 7, 1983 "Motion to Suppress Evidence" and their January 10, 1983 "Amended Motion to Suppress and Motion for Return of Property." The government has named the defendants, Charles E. Griffin and his cousin Jerome Griffin, in a one count indictment charging unlawful possession with the intent to distribute phencycledine, a Schedule II Controlled Substance, in violation of 21 U.S.C. § 841(a)(1).[1] The single count also charges a violation of 18 U.S.C. § 2, aiding and abetting.

Through their instant submissions, the defendants have moved to suppress the introduction of 805 grams of phencycledine and seek the return of two revolvers seized from a 1982 Chevrolet Corvette automobile on December 2, 1982. A suppression hearing was held on January 19, 1983 at which

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[1] 21 U.S.C. § 841(a)(1) provides:

Except as authorized by the subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to . . . possess with the intent to distribute . . . , a controlled substance.

Jerome Griffin, Charles Griffin, and Indiana State Trooper Dennis Hostetter testified. Recognizing that the assessment of the credibility of those witnesses and resolution of their conflicting recollections is a question of fact for this Court to determine, *United States v. Mattes,* 687 F.2d 1039, 1042 (7th Cir. 1982); *United States v. Davis,* 514 F.2d 1085, 1088 (7th Cir. 1975), the following analysis constitutes this Court's findings of fact and conclusions of law.

I. Facts.

During the early evening hours of December 2, 1982, Indiana State Trooper Zimmerman pulled behing a speeding Corvette on the Indiana Toll Road. Because his roof mounted lights were not functioning, Trooper Zimmerman attempted to get the Corvette driver's attention by flashing a spot light on the rear window of that vehicle. Rather than pull over or even slow down, the Corvette sped quickly our of sight. Zimmerman radioed this information to other officers; it was then shortly after 5:30 P.M. Although this radio transmission provided a general description of the vehicle, it did not include the license number. The Corvette was dirty and the plate numbers were too obscured to discern.

Shortly thereafter, the Middlebury exit toll attendant radioed that a Corvette, answering the same description, had exited the toll road. Approximately one half hour later, the same toll attendant radioed that a Corvette had come back on the toll road. A general description of a silver Corvette and its occupants was provided. The attendant was unable to perceive the license number, however, due to the dirty condition of the plate.

At about the same time, State Trooper Kensil radioed that he had stopped a silver Corvette only three months before along the same stretch of highway. Kensil advised that Charles Griffin of Gary, Indiana was then ticketed for speeding; he had been clocked at 134 m.p.h. In addition, Trooper Kensil supplied the California license plate number from the Corvette he had previously stopped.

Indiana State Troopers Hostetter, Nufer and Brandenburger, along with other officers patrolling the toll road at that time, had been individually monitoring the prior radio transmissions concerning the Corvette. Recognizing that the Corvette was traveling in his direction and would reach his location first, Troop Hostetter positioned himself so that he could properly observe the vehicle. After a short period, Hostetter saw a Corvette go by and he pulled in behind it. As he followed, Trooper Hostetter was unable to determine whether this was the same Corvette Officer Kensil had ticketed previously for such excessive speed, as the license plate numbers were too dirty to make out.

Concerned, nonetheless, that this might possibly be the same Corvette that had eluded Trooper Zimmerman earlier, Hostetter maintained his position behind the Corvette until it approached the location of other troopers. Once in that proximity, Hostetter flashed his roof mounted lights and the Corvette pulled off the traveled portion of the toll road, onto the shoulder provided for emergency stops. Trooper Hostetter pulled off and stopped his car directly behind the Corvette. At almost that same time, Trooper Nufer arrived on the scene. He pulled far off the road, positioning his vehicle adjacent to the passenger side of the Corvette. Shortly thereafter, Trooper Brandenburger arrived at the scene and parked behind Hostetter's vehicle.

Trooper Hostetter then got out of his patrol car and approached the driver seated in the Corvette. Hostetter asked for a driver's license and vehicle registration, informing the driver, Jerome Griffin, that he had been pulled over for an improperly displayed registration, or, in the vernacular, a dirty license plate.

Jerome Griffin told Trooper Hostetter that he did not have a license. Jerome Griffin also failed to produce proof of the vehicle's ownership and/or registration. Hostetter then asked

Jerome Griffin to produce any form of identification. Jerome provided what was described as an "Illinois I. D. card." Because of his failure to provide the requisite license and registration, Hostetter instructed Jerome Griffin to come to his patrol car and have a seat so that Hostetter could run a license check with the State of Illinois. Once back in the patrol car Jerome informed Hostetter that he did not have a valid Illinois license.[2] Instead, he claimed possessing only an expired California license. Upon gaining this information, Trooper Hostetter radioed his post and requested a license check and plate registration confirmation from the State of California.

Trooper Hostetter next advised Jerome that, although he was only going to give him a warning for the improperly displayed registration, Jerome would be ticketed for his failure to possess a valid operator's license. Hostetter then informed Jerome what the approximate cost of the fine or bond might be for that violation. When confronted with the need for possibly forty or fifty dollars, Jerome let Hostetter know that he didn't have that amount of money with him. Notwithstanding his own lack of cash, Jerome explained that if he was permitted to see the passenger in the Corvette, Charles Griffin, he (Jerome) could borrow the necessary funds. Wanting to assist Jerome, Hostetter consented to the meeting. The trooper did check Jerome's person for weapons, however, for the first time, prior to allowing him to speak with Charles. Finding nothing, Hostetter accompanied Jerome to the Corvette. Once there, the trooper looked into the vehicle to survey that which was in plain view; Hostetter did not enter the Corvette at that time.

During the entire period in which Jerome Griffin was in the company of Trooper Hostetter, Charles Griffin remained under

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[2] This fact was confirmed via radio while Jerome was still in the patrol car, i.e., "no Illinois license presently in file."

the scrutiny of Trooper Nufer. Recalling that this was the same vehicle[3] stopped earlier on the same road for 134 m.p.h., Nufer questioned the passenger, Charles Griffin, and identified him[4] as the same driver. Accordingly, Nufer ran a check for outstanding warrants with Charles Griffin's home county. That county, Lake, reported that Charles had failed to appear on another, unrelated traffic violation, and that on October 8, 1982 a bench warrant was as yet still outstanding. Charles Griffin was consequently placed under arrest and taken into custody. Prior to relaying[5] Charles Griffin back to Lake County authorities, the two troopers did allow the Griffins to speak to one another. Thus, Jerome was able to secure the additional cash which he might need to pay a fine or post bond on the driving without a valid operator's license charge.

It was during this same conversation that Jerome advised Charles that the troopers were going to impound the Corvette. Upon hearing this, Charles communicated his opposition to any impound. Instead, Charles suggested that that Corvette remain parked in the emergency lane along the toll road until his girl friend, from Gary, Indiana, could pick it up. Thereinafter Jerome adopted this same opposing position.

Trooper Hostetter would not agree, however, to leave the Corvette on the side of the road for such an extended length of time.[6] He was concerned not only about the danger it presented to other motorists, but also considered the high incident of theft

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[3] Upon close observation, Trooper Nufer was able to confirm that the plates on the Corvette corresponded to those reported by Trooper Kensil as the subject of his earlier speeding arrest.

[4] Charles Griffin presented a valid Indiana operator's license for identification purposes.

[5] A relay involves troopers passing a prisoner from one westbound unit to another until the final vehicle arrives at the intended destination.

[6] Although no precise period was mentioned, it would appear that even if Charles Griffin's girl friend left immediately it would take over four hours to reach the site of the Corvette.

inherent in that type of vehicle. Morever, Hostetter recalled to Jerome a prior incident in which the State Trooper attempted to accomodate a driver by allowing his friends to remove the vehicle only to have those friends turn around and steal that same car. Thus, Hostetter determined that he would not make the same mistake and expose himself or his department to additional, unwarranted liability by turning over the out of state Corvette to an as yet unknown third party without even having first confirmed actual ownership of that same vehicle.[7]

Having refused Charles' third party pick up request, Hostetter instructed Jerome to lock up the Corvette. Once secured, the officers left the vehicle parked along the toll road.[8] Hostetter routinely transported Jerome to town court in nearby Fremont, Indiana and Nufer began the first leg of Charles' westward relay.[9]

Shortly thereafter, Jerome Griffin completed a brief appearance in town court. He pled guilty to the failure to possess a valid operator's license charge and promptly paid the fine assessed. At that point in time, Jerome was free to go wherever he wished.[10]

During Jerome's appearance Roger Fulton arrived at the town court. He was there in response to Trooper Hostetter's radio request that the towing service provide a driver to remove the Corvette. Fulton's presence was entirely consistent with

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[7] Although the name of the actual owner, Cleota Griffin, may have been confirmed, his exact relationship to Jerome and Charles Griffin was not.

[8] There was no testimony or direct challenge as to why they proceeded to the Fremont court without first having the vehicle removed from the highway.

[9] See note 5, *supra.*

[10] Defendants attempt to contradict the claim that Jerome was free to go. Rather, they insist that he was ordered by Hostetter to return to the Corvette. The Court finds, however, that the totality of circumstances does not support this position. For whatever reason, Jerome returned of his own accord.

past practices implemented for the impound of Corvettes. Because of the likelihood of possibly severe body damage to the fiberglass vehicle if conventional towing methods were employed, where possible, the troopers permitted the tow service to drive this type of impounded vehicle away. This policy protected the interest of the troopers, the tow service and the owner of the Corvette.

Prior to leaving with Fulton to remove the Corvette, Hostetter offered to take Jerome to a motel, or if Jerome wished, to arrange for a westbound bus to stop along the toll road to pick him up. Although Jerome didn't especially want any further assistance from the authorities, and he also claimed the need to make a phone call, Jerome did advise Hostetter that he needed to return to the car to find his misplaced apartment keys. Jerome therefore accompanied Hostetter and Fulton in the patrol car back to the Corvette. Along the way, Jerome gave Fulton the keys to the Corvette as he was instructed to do by Hostetter.

Once back at the Corvette, Fulton unlocked the driver's side door for Jerome. Jerome then reached into the vehicle and began to look for his keys. While Jerome was still in the process of his search, Hostetter approached the vehicle with a flashlight to assist Jerome. In addition, Hostetter intended to begin his initial inventory of the impounded vehicle, pursuant to a departmental policy that all impounded vehicles be inventoried prior to being towed or driven away. This perfunctory inventory was performed with a dual purpose in mind. First, it discouraged the possibility of theft by the towing services while at the same time facilitating a defense for towing services against future unfounded claims of loss by embittered arrestees.

After instructing Jerome to unlock the passenger door, Hostetter began to check for the presence of valuables. The trooper reached initially into the open rear area of the two seat vehicle and lifted the lid off an unlocked, recessed storage

compartment located directly behind the passenger seat. Hostetter saw two revolvers. He quickly replaced the storage compartment lid and looked up to check on Jerome who was still in the process of searching for his misplaced keys. Recalling the presence of elasticized map pouches in the doors of the Corvette, Hostetter reached into the one located in the passenger door and discovered the keys.

Following the return of Jerome's apartment keys, the trooper checked the guns again to see if they were loaded. While observing that the ammunition clips were in the weapons, Hostetter noticed a brown paper bag resting beneath the revolvers. He reached down and removed the bag from the compartment. Immediately, the trooper was struck by medicinal odors emanating from the bag and an open jar of hand cream in the rear of the vehicle. Hostetter opened the bag and saw another bag inside which was securely wrapped by a fibrous plastic tape. He did not open the wrapped bag at this time. Instead, the trooper decided to postpone his investigation until the vehicle was further removed from traffic along the high speed toll road. Hostetter put the bag back in the compartment with the guns and replaced the lid. The trooper then instructed Roger Fulton, the tow service driver, to drive the Corvette to a maintenance area located about two miles down the highway. Hostetter followed in his patrol car with Jerome riding in the front passenger seat.[11]

Once in the maintenance area, Hostetter ran a radio check on the weapons. He found nothing currently pending. At that same time, the trooper took the bag out of the storage compartment again. Although suspicious of its contents, Hostetter did not know what it contained. The officer decided

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[11] There was no testimony as to whether Hostetter questioned Jerome about the revolvers or the wrapped package as the two rode to the maintenance area. There was, however, independent testimony, unknown at the time to Hostetter, that Charles Griffin possessed an "unlimited license" purportedly authorizing the possession of such firearms.

that regardless of what could be in it, he was responsible for the contents. Consequently, Hostetter opened the sack, removed the wrapped package, and opened up an end portion, unsecured by the tape, to see what it was so that he might put that information down on his inventory.[12] The trooper saw a yellow substance in a clear plastic bag. Hostetter did not open the clear plastic bag. Rather, he radioed Trooper Nufer requesting that he join him at the maintenance area. Nufer arrived promptly,[13] looked into the bag through the opened end and joined Hostetter in the suspicion that the wrapped package contained a controlled substance. To that point the clear plastic bag remained intact and had yet to be removed from the vehicle. After Nufer's confirmation, Jerome Griffin was placed in custody with his hands cuffed behind him.

This concludes the factual background developed at the suppression hearing. In support of its position the government urges that the warrantless search and subsequent seizure of the contents of the wrapped package was justified as a search incident to arrest, or, in the alternative, as part of the inventory of the contents of a lawfully impounded vehicle. Furthermore, the government provides that based upon the totality of the circumstances there was sufficient probable cause to justify the trooper's opening of the package.

Conversely, defendants argue that this matter should be viewed as a container search case as opposed to an automobile case. From that standpoint, the Griffins argue that they possessed a reasonable expectation of privacy in the wrapped package in question.

In determining this matter the Court recognizes as was stated in *Mincey v. Arizona,* 437 U.S. 385, 389 (1978), *quoting* from *Katz v. United States,* 389 U.S. 347, 357, that: "[T]he

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[12] Transcript, at 74.

[13] Apparently Nufer had already completed his portion of the relay for he arrived alone.

Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions . . ." (Citations omitted.) And in *Chimel v. California,* 395 U.S. 752, 762, Justice Stewart pointed out that "the general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . .", (quoting from *United States v. Jeffers,* 342 U.S. 48, 51). *See United States v. Farinacci-Garcia,* 551 F.Supp. 465, 469 (D.PuertoRico 1982). The Court shall therefore consider separately each of the justifications raised by the government.

II. Search Incident to Arrest.

The government relies heavily upon the recent Supreme Court decision announced in *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860 (1981), to justify its claim that Trooper Hostetter's search of the wrapped package was a permissible, "well-delineated" exception to the Fourth Amendment's warrant requirement because it was incident to a lawful arrest. More specifically, the government seeks to support Hostetter's opening of the untaped end of the package through reference to the holding in *Belton* which provides that "the police may . . . examine the contents of any containers found within the passenger compartment." *Id.* at 2864. Presumably, the government would have the Court approve Hostetter's actions solely because the wrapped package was found within the Corvette's passenger compartment. Such a conclusion erroneously ignores the fact, however, that the *Belton* holding was based upon that Court's introduction of a "bright-line" rule which established that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a *contemporaneous incident* of that arrest search the passenger compartment of that automobile." *Id.* (Emphasis added.) Consequently, this Court

must not confine its analysis to merely where the container was found, but must consider whether there was a lawful arrest and, if so, whether Hostetter's search was a contemporaneous incident of that arrest.

This analysis is not assisted by the government's failure to specify which arrest(s), the initial traffic violations or the present drug charge, it believed the search was contemporaneous with. For the sake of clarity, the Court shall separate these arrests, turning first to consider the traffic offenses.

Clearly, the traffic arrests were lawful. Reasonable suspicion of illegality existed; not simply from a subjective belief, but from articulable and objective facts—the license plates were too dirty to discern. *See Uniied States v. Cortez,* 449 U.S. 411, 416 (1981). Based upon that reasonable suspicion, the trooper conducted a valid investigatory stop. *See Delaware v. Prouse,* 440 U.S. 648, 663 (1979). The two arrests that resulted from the limited, subsequent investigation were therefore proper. *Mapp v. Ohio,* 367 U.S. 643 (1961). Whether Hostetter's search was a contemporaneous incident of those arrests is an entirely different matter, however.

Although there was no direct testimony establishing precisely how much time actually elapsed from the initial arrest until the commencement of the challenged search, the Court finds that, based on the aforementioned finding of fact, the delay incurred by first traveling to and from the Fremont town court, including the plea and payment of fine, entailed at least forty-five minutes.[14] In assessing the impact of that delay, the Court recognizes that the Fourth Amendment does not impose on the police a requirement that the search be absolutely contemporaneous with the arrest. *United States v. Fleming,* 677 F.2d 602, 607 (7th Cir. 1982). Nevertheless, it is surely

[14] This determination is certainly a minimum figure as the trooper's own testimony established that the trip, there and back, encompassed twenty-six miles. Nonetheless, as is apparent, an exact determination is not required.

possible for a search incident to arrest to be undertaken too long after the arrest and too far from the arrestee's person. *Id.* That was the lesson of *United States v. Chadwick,* 433 U.S. 1 (1977).[15]

In that case the search was conducted more than an hour after the agent had exclusive control of a footlocker and long after the arrestees were securely in custody. Those facts led the *Chadwick* Court to conclude that the subsequent search of the footlocker could not "be viewed as incident to the arrest or as justified by any other exigency." 433 U.S. at 15.

The opposite side of the coin was presented in the case of *New York v. Belton, supra.* There the search took place at the time and scene of the arrest concurrent with exigent circumstances: a single officer took four defendants into custody in close proximity to the automobile along an open highway. While neither *Chadwick* nor *Belton* is by itself dispositive, this Court finds that the relevant considerations, contemporaniety and exigency of the circumstances, are closer to *Chadwick.* The subsequent search of the Corvette cannot be viewed as incidental to the traffic arrest or as justified by other exigencies.

The arresting trooper's own testimony compels this conclusion. Jerome Griffin was not viewed as a threat. In fact, Trooper Hostetter did not testify as having searched his person again, even after the discovery of the guns and wrapped package. When the trooper began his inventory he considered Jerome as a free man who was on the scene only to retrieve lost keys. Charles Griffin was of course, long gone by this time. Consequently, this was not a traditional "on the spot" search, but one which took place at a time and under circumstances isolated from factors which might otherwise be characterized as exigent. This search was simply not incident to the traffic arrests.

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[15] The Court notes that *Chadwick* is not a true automobile case, but rather one focusing on exclusive control.

Thus, the government is left with the alternative theory that this search was incident to the present drug charge. The mere fact that the search preceded the drug arrest is not in itself dispositive. A search incident to arrest may precede the actual arrest so long a probable cause for that arrest *existed prior to* the actual search. *Rawlings v. Kentucky,* 440 U.S. 98, 109 (1980); *United States v. Brown,* 463 F.2d 949, 950 (D.C.Cir. 1972) (emphasis added). Consequently, the fruits of the search must not be required to support the existence of probable cause.

Clearly, the knowledge possessed by Trooper Hostetter at the commencement of his search was insufficient to support probable cause for the drug arrest. *See Draper v. United States,* 358 U.S. 307, 313 (1964); *United States v. Gaston,* 620 F.2d 635, 638 (7th Cir. 1980). The facts, taken into total,[16] confirm that probable cause to arrest the defendants did not exist until after the search of the Corvette revealed the revolvers and the wrapped package emitting a medicinal odor was opened. *See e.g., Johnson v. United States,* 333 U.S. 10, 13 (1948) (odor of methylamine a powerful indicia of illicit drug trade); *United States v. Haynie,* 637 F.2d 227, 233 (4th Cir. 1980) (probable cause may be supported by the detection of distinctive odors as well as sight).[17] Because the fruit of the search provided probable cause, the Court finds that Trooper Hostetter's opening of the wrapped package cannot be condoned as a search incident to arrest. The search remains therefore a search subsequent to an auto inventory, the subject of the Court's next inquiry.

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[16] As observed earlier, Jerome Griffin was not under any suspicion prior to the discovery of the weapons. He had paid his fine and was apparently on the scene only to catch a bus ride after retreiving his apartment keys.

[17] *See also* Annot., 5 A.L.R. 4th 681, 687-98 (1981) (collecting cases) ("Odor of Narcotics as Providing Probable Cause for Warrantless Search".)

III. Automobile Inventory.

As a second ground for sustaining the search, the government argues that Trooper Hostetter's opening of the wrapped package constituted an administrative search of the type sanctioned by the Supreme Court in *South Dakota v. Opperman,* 428 U.S. 364 (1976). As such, there would be no need for either a warrant or probable cause. *United States v. Morkland,* 635 F.2d 174, 178 (2nd Cir.), *cert. denied,* 451 U.S. 991 (1981).

Defendants' objections to that position were two fold. First, the defendants argue that the December 2, 1982 inventory was nothing more than a pretext for what would otherwise be an unlawful investigatory search. Second, the defendants argue that *Opperman* does not grant police the right to open secured packages.

In addressing defendants' first premise the Court observes that it is well settled that law enforcement officials need not obtain a warrant to conduct a routine inventory search. *Opperman,* 428 U.S. at 396. The Court is also cognizant of the fact that inventory searches must, however, "be limited to effectuation of the recognized purposes for which they are conducted and they may not be used as a pretext for intrusive investigatory searches that would otherwise be impermissible." *United States v. Prescott,* 599 F.2d 103, 105 (5th Cir. 1979).

Nonetheless, this Court remains unpersuaded that Trooper Hostetter undertook the inventory search as a subterfuge for an investigatory search. The record reveals that it was a standard practice for state troopers to routinely undertake the inventory of such vehicles pursuant to a departmental policy which required that all impounded vehicles be searched prior to being towed or driven away by the towing service. *See United States v. Balanow,* 392 F.Supp. 200, 201 (N.D.Ind. 1975), *aff'd.,* 528 F.2nd 923 (7th Cir. 1976). Furthermore, credible testimony established that Trooper Hostetter took custody of an expensive sports car which would have been otherwise left unattended,

possibly for an extended period, in close proximity to the traveled portion of a busy, high speed roadway. There was also a danger to other motorists, along with the need to protect the state from civil liability based upon unfounded property claims for lost or stolen items. Adopting these determinations, the Court must conclude that Hostetter's seizure was justified and that based on these considerations, substantially similar to those underlying the premise in *Opperman,*[18] the initiation of the subsequent routine inventory search was reasonable and therefore consistent with the constitutional commands and guarantees of the Fourth Amendment. 428 U.S. at 368-69.

The Court's determination, that the pre-tow inventory was properly undertaken (pursuant to *Opperman*), does not, however, foreclose defendants' second challenge which questions whether Trooper Hostetter's opening of the securely taped package was within the permissible scope of that same inventory. To resolve this issue, the Court must determine whether the trooper's later actions were consistent with the purposes of inventory searches and therefore in compliance with the reasonableness requirements of the Fourth Amendment. *See United States v. Prescott, supra,* 599 F.2d at 105 (where search is routine it must be limited to effectuating the recognized purposes under which it was conducted).

The *Opperman* plurality identified those relevant purposes as being:

> (1) "the protection of the owner's property while it remains in police custody"; (2) "the protection of the police against claims or disputes over lost or stolen property"; and (3) "the protection of the police from potential danger."

428 U.S. at 369. That holding approved an inventory search of a car impounded for multiple parking violations. Marijuana

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[18] The *Opperman* court recognized a similar "community caretaking" function of the police under such circumstances. 428 U.S. at 368.

was discovered in the unlocked glove compartment and the use of it as evidence in a later prosecution for possession of a controlled substance was upheld. The Court justified such inventory searches as incident to the caretaking function of local police to protect the community's safety. In addition to finding that the inventory searches supported the aforementioned purposes, the *Opperman* Court accomodated the reasonableness requirement of the Fourth Amendment by pointing to the public's reduced "expectation of privacy with respect to ones automobile." *United States v. Hill,* 458 F.Supp. 31, 33 (D.D.C. 1978), *quoting Opperman, supra,* 428 U.S. at 367. Factors found to contribute to this reduced expectation included: (1) pervasive and continuing governmental regulation which frequently results in examination of vehicles by the police and (2) the public nature of automobile travel in which both its occupants and contents are in plain view. *Id.*

Not surprisingly, the government relies on *Opperman* to support the legitimacy of Trooper Hostetter's search. Particularly appropriate, the government believes, is the *Opperman* plurality's approval of examinations within an unlocked glove compartment, "since it is a customary place . . . for the temporary storage of valuables." 428 U.S. at 370. That same logic would certainly seem to sanction the trooper's examination of the unsecured storage compartment—a customary place . . . for the temporary storage of valuables.[19] *Id.* Similar reliance on *Opperman* to support the opening of the bag and taped package, as the government urges, would, however, be misplaced.

First, the inventory in *Opperman* did not involve the inspection of containers or sealed packages found within the impounded vehicle. As the *Opperman* dissenters stressed, "the Court's opinion does not authorize the inspection of suitcases,

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[19] This same language is also significant because it makes it apparent that the auto inventory exception will not permit an unlimited search of the vehicle or its contents.

boxes, or other containers which might themselves be sealed, removed or secured without further intrusion." *Id.* at 388 n.1. (Marshall, J. with whom Brennan and Stewart, JJ. joined dissenting). Thus, though the contrary is sometimes erroneously assumed, *Opperman* cannot be utilized, as the government attempts, to license unilaterally the opening of the wrapped package.

As noted above, the Court's primary area of concern is no longer the validity *vel non* of the inventory search, but whether the scope of the instant search was permissible. On this score, the government's *Opperman* argument begins to break down, for as Justice Powell's concurring opinion recognized,[20] the Court in "[u]pholding searches of this type provides no general license for police to examine all the contents of such automobiles." *Id.* at 379-80.

Notwithstanding Justice Powell's view that the scope of a warrantless search does not provide a general license for the police to examine the Corvette's contents, the government argues that the standard procedures employed here which prompted the search of the wrapped package are consistent with the purposes of inventory searches and are therefore permissible. Specifically, the government asserts that:

> "[T]he police . . . were justified under the guidelines set forth in *Opperman* in investigating the contents of the brown paper bag. The original purpose for the search was not investigatory but for the protection of the police officer against claims of lost property or the protection of the owner's property while it is in police custody."[21]

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[20] *Opperman* was a five to four decision. Accordingly, this Court attaches considerable significance to Justice Powell's concurring opinion.

[21] Government's Memorandum, at 3. The Court also notes that the government does not raise or rely upon an additional governmental interest established in *Opperman,* the protection of police from danger. 428 U.S. at 369. The Court will nonetheless briefly address this interest *infra.*

While the legitimacy of these purposes cannot be disputed, they must be weighed against defendants' expectations[22] that the paper bag and its contents would not be disturbed. *Hill, supra,* 458 F.Supp. at 36. Just because the trooper could legitimately impound the Corvette and retain the brown bag found within, it does not necessarily follow that the contents of that bag are subject to search under that same inventory exception. *See United States v. Stevie,* 582 F.2d 1175, 1178 (8th Cir. 1978). The trooper's custody of the Corvette does not divest the defendants[23] of privacy expectations relating to items found within the vehicle any more than does the fact that the items were placed in an automobile. *United States v. Jackson,* 529 F.Supp. 1047, 1053 (D.Md. 1981).[24]

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[22] The Court observes that a determination of defendants' reasonable expectations of privacy normally includes the question of "standing" to challenge the search along with the substantive claim that the government violated their legitimate privacy expectations, *see Rawlings v. Kentucky,* 488 U.S. 98, 106 (1980), as only those persons whose Fourth Amendment rights have been violated are entitled to protection of the exclusionary rule. *United States v. Salvucci,* 448 U.S. 83, 86 (1980).

In this matter, the Court finds that defendants plainly had reasonable expectations of privacy in an automobile owned by a close relative over which they were exercising exclusive control pursuant to the owner's permission at the time of the search. *United States v. Posey,* 663 F.2d 37, 41 (7th Cir. 1981); *see Rakas v. Illinois,* 439 U.S. 128, 143 (1978). Apparently the government agrees that the search and seizure implicated defendants' Fourth Amendment rights as to the issue of "standing" was not specifically raised. *But cf. United States v. McConnell,* 500 F.2d 347 (5th Cir. 1974), *cert. denied,* 420 U.S. 946 (1975) (loaned car may be subject to lesser degree of privacy).

[23] For the purposes of this motion only, the Court treats the package as having belonged to the defendants or as being within their custody and control.

[24] Other courts have applied this privacy-based rationale to invalidate searches of containers found within a legally detained

(Footnote continued on following page)

Clearly, such expectations of privacy were objectively signalled by enclosing the phencyclidine in opaque paper, the wrapping of strong, fibrous tape around that paper, the placing of that secured package in a brown paper bag,[25] and then depositing same within the covered storage compartment. *See Katz v. United States,* 389 U.S. 347 (1967); *United States v. Dien,* 609 F.2d 1038, 1044 (2nd Cir. 1979). It is therefore left for this Court to ascertain whether the governmental interest in performing an inventory search is better served by itemizing the contents of the bag, including the package within, or by storing

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(Footnote continued from preceding page)

vehicle. *See e.g., United States v. Wilson,* 636 F.2d 1161, 1164-66 (8th Cir. 1980) (locked trunk); *United States v. Miller,* 608 F.2d 1089, 1101 (5th Cir. 1979) (portfolio); *United States v. Bloomfield,* 594 F.2d 1200, 1201-03 (8th Cir. 1979) (closed knapsack); *United States v. Davis,* 501 F.Supp. 23, 25-26 (N.D.Ga.1980) (briefcase); *United States v. Hill,* 458 F.Supp. 31, 33-37 (D.D.C.1978) (flight bag); *Cf. United States v. Markland,* 635 F.2d 174, 176-77 (2d Cir. 1980), *cert. denied,* 451 U.S. 991, 101 S.Ct. 2332, 68 L.Ed.2d 851 (1981) (insufficient expectation of privacy in zippered food storage bag).

[25] That such legitimate privacy interests are present in a brown paper bag is no longer in dispute. That question was finally put to rest in *United States v. Ross,* 456 U.S. ____, ____, 102 S.Ct. 2157, 2171 (1982), when the Court determined:

> [t]hat a constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve in a series of cases in which *paper bags,* locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a *paper bag* or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

(Footnotes omitted.) (Emphasis added.)

the bag and/or package as a unit. *See United States v. Bloomfield,* 594 F.2d 1200, 1202 (8th Cir. 1979).

First, insofar as government attempts to justify the search as a protection against false claims, those interests are fully served merely by inventorying "one brown bag" or "one tape wrapped package" where, as here, the package is secure and there is no danger of anything falling out. *Id.; United States v. Neumann,* 585 F.2d 355, 359 (8th Cir. 1978). Moreover, as Justice Powell observed:

> "It is not clear, however, that inventories are a completely effective means of discouraging false claims since there remains the possibility of accompanying such claims with an assertion that an item was stolen prior to the inventory or was intentionally omitted from police records."

Opperman, supra, 428 U.S. at 378. This observation may be particularly apropos in this instance for the police's concern, to be protected against such claims, is diminished in light of the fact that this expensive sports car was left unattended for over forty-five minutes[26] before Trooper Hostetter returned to the scene.

Second, with respect to the government's concern for the protection of the owner's property, the Court again fails to perceive how an inventory of the contents of such a secured package adds to that protection. *Hill, supra,* 458 F.Supp. at 37. As long as the police could show that the bag and/or package was never opened while in their custody, both the police and the owner would be fully protected. *Wilson, supra,* 636 F.2d at 1165.

This same question was presented in *United States v. Bloomfield, supra,* where the only issue before the court was "whether, in an inventory search of an automobile, a knapsack

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[26] See note 14, *supra.*

found therein should be inventoried as a unit or opened and itemized." 594 F.2d at 1202. The court determined:

> "[B]ecause the knapsack was tightly sealed and there was no danger of anything slipping out, the first two purposes [the protection of the owner's property and protection of the police against claims] are better served if the knapsack is inventoried as a unit. In this way the knapsack, which is locked up as a whole in police headquarters, has never been opened and its contents have never been removed, reshuffled and replaced. To our minds, this would minimize the possibility of loss and the possibility of false claims against police by the owner."

Id.

As demonstrated by the Court's own analysis, the Court finds this conclusion persuasive. This is not to say, however, that the police must always accept such items as a "pig in a poke," oblivious to its true contents. Certainly, in some cases, there may be a legitimate concern that the contents might be perishable, valuable, or even dangerous.[27] *United States v. Marklund,* 635 F.2d 174, 176 (2nd Cir.), *cert. denied,* 451 U.S. 991 (1980). In *Opperman,* where the driver was not present, such considerations were recognized. 428 U.S. at 375-76. Here, by contrast, the government offers no such special justification for the search and Jerome Griffin, the driver, was present during the search. Accordingly, the police could have possibly pursued the inventory without further unnecessary intrusions into the privacy interest present. The police, for example, could have asked Jerome what was in the package, or, in the alternative, could have requested his consent to the search of the wrapped package. *See Wilson, supra,* at 1165. What Jerome's answers might have been is not our concern and is not before the Court. What is before this Court, however, is to determine whether the governmental interests advanced to justify such intrusions against the constitutionally protected

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[27] See note 21, *supra.*

interests of the individual citizen in the privacy of his effects outweighs such omissions or sanctions such acts. *Opperman, supra,* 428 U.S. at 378. In this cause the Court must conclude that they do not.

Finally, the government places great emphasis upon the fact that this inventory was nothing more than a standard procedure required in such circumstances. Although alone not determinative of the constitutionality of a warrantless inventory search, the existence of, and compliance with, established regulation or standard practices relating to inventories is a crucial factor to be weighed when assessing the reasonableness of the scope of such a search. *Jackson, supra,* 529 F.Supp. at 1054. As Professor LaFave has commented:

> "What is needed in the vehicle inventory context, then, as is true of many other types of inspections or regulatory searches, is not probable cause but rather a regularized set of procedures which adequately guard against arbitrariness. This is why Justice Powell repeatedly emphasized that the inventory in question was 'conducted strictly in accordance with the regulations of the Vermillion Police Department,' and why the plurality stressed that *Opperman* squared with *Cady* in that in both instances
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> > the protective search was carried out in accordance with *standard procedures* in the local police department, * * * a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the care-taking function.
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> * * *
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> Inventories should not be upheld under *Opperman* unless the government shows that there exists an established reasonable procedure for safeguarding impounded vehicles and their contents and that the challenged police activity was essentially in conformance with that procedure."

2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.4(a) at 576-77 (1978) (footnotes omitted) (emphasis in original).

In this cause, while the government has established that the initiation of the inventory was a standard practice under these circumstances, the government has not shown the existence of any formal guideline or regulation defining the permissible scope of the trooper's search.[28] Unlike the situation in *Opperman,* the scope of this search appears to have been left to the absolute discretion of Trooper Hostetter. Consequently, his actions, in opening the bag and the sealed package within, are not sustainable under an inventory rationale. *Jackson, supra.*

Without attempting to impugn the motives of Trooper Hostetter, in the absence of such regulation the danger of hindsight justification is too great to justify the extent of his search; particularly where, as here, the item was concealed and its character was not immediately discrenable. *Id.* Accordingly, although Trooper Hostetter had the right to search the vehicle and retain the bag, for the purpose identified in *Opperman,* the absence of standard procedures regulating the scope of that search and the maintenance of privacy expectation superior to the governmental interests articulated precludes the use of the inventory exception to authorize the opening of either the bag or the tape-wrapped package within. *Id.*

In light of the above finding, the Court is left with the government's final argument that "based on the totality of the circumstances there was sufficient probable cause" to support the opening of the bag and package. The Court therefore turns to resolve this remaining issue.

IV. Automobile Exception.

The government's final focus theorizes that if the Court considers "this as solely a 'probable cause case', then it is justified under the holding in *Ross.*"[29] (Government's Memo-

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[28] Trooper Hostetter testified that although he could not quote the department's standard procedures, they were followed.

[29] *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157 (1982).

randum, p. 6). In support of same, the government contends that "*Ross* says that the extent to which you may search a lawfully stopped vehicle does not depend on the type of container to be searched . . ., nor merely because a container is located in an automobile . . ., but the extent of a warrantless search will depend on whether the police officer has probable cause."[30] *Id.* at 5.

Defendants argue, conversely, that "[N]owhere in the facts . . . is there any evidence of any probable cause for the officers to believe that contraband was somewhere in the Griffin vehicle prior to making the search that revealed the paper bag." (Defendants' Second Memorandum, p. 7). In addition, defendants assert that "the unusual fact situation surrounding the search could very well take it out of the automobile [exception] category" and that their reasonable privacy expectations negate a warrantless search. *Id.* at 11-12. Although defendants' contentions are closer to the mark, both sides misconstrue the present impact of *Ross.*[31] Accordingly, it is left for this Court to determine the applicability, if any, of the automobile exception under the present facts.

That exception was originally set forth in *Carrol v. United States,* 267 U.S. 132 (1925). Since then, the automobile exception has been reaffirmed and further defined in *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157 (1982), where the Court provided that "a warrantless search of an automobile stopped by police officers who have probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment." 456 U.S. at ____, 102 S.Ct. at 2159. In *Ross,* the Court defined the scope of the search that was permissible and held that "if probable cause justifies

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[30] As discussed *infra,* a more accurate statement would conclude that the extent to which you may lawfully search depends on the extent of the probable cause.

[31] *See* note 29, *supra.*

the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at ____, 102 S.Ct. at 2172. Moreover, the Court stated that the vehicle exception permits as thorough a warrantless search of the vehicle as a magistrate could have authorized in a warrant as "only the prior approval of the magistrate is waived." *Id.* at ____, 102 S.Ct. at 2172.

Turning to consider the scope and present impact of the post-*Ross* automobile exception, it is important to stress that the *Ross* Court did not overturn the prior cases of *United States v. Chadwick,* 433 U.S. 1 (1977) and *Arkansas v. Sanders,* 442 U.S. 753 (1979).[32] Rather, the Court distinguished the facts of *Ross*[33] from those of *Chadwick*[34] and *Sanders,*[35] by determining that in the latter cases the police did not have probable cause to search the defendant's entire vehicle. *Ross, supra,* at 2168. What this means in terms of this Court's present analysis is that if there was only probable cause to search a particular container in the vehicle but not probable cause to search the vehicle generally, as was true in *Chadwick* and *Sanders, Ross* does not control and a warrant will be required to search the container.

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[32] The majority stated that it rejected the part of the reasoning in *Sanders* on which the plurality opinion had relied upon in *Robbins v. California,* 453 U.S. 420 (1981) (overruled by *Ross*), but otherwise adhered to its holding in that case. 102 S.Ct. at 2172.

[33] In *Ross,* officers acting on a tip that individual was selling narcotics kept in the trunk of a certain car parked at a specific location, drove to that location and arrested driver who matched informant's description. Officers opened trunk, found a closed brown paper bag, and after opening discovered herein. After removing the car to headquarters, another warrantless search revealed a zippered pouch containing cash. Warrantless search upheld on basis of probable cause to believe contraband was concealed within the vehicle. 102 S.Ct. at 2166.

[34] In *Chadwick,* a warrantless search was conducted on a 200 pound footlocker secured by two padlocks. Railroad officials became suspicious of the footlocker when they noticed its unusually heavy

(Footnote continued on following page)

2 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment,* § 7.2 (1978 & Supp. 1983 pp. 174-75).[36]

This is clear for, in adopting the distinction made by the Chief Justice in his concurring opinion in *Sanders,* the Court in *Ross* expressly differentiated between the situation in which an officer's suspicion falls upon a particular container or luggage, but he has no probable cause to search the entire vehicle, and that in which probable cause justifies the search of the whole vehicle which in turn justifies the search of every part of the

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weight and that it was leaking talcum powder, a substance often used to mask the odor of marijuana. Alerted narcotics agents met the train, but did not seize the footlocker. Rather, they waited until respondent arrived and placed the footlocker in trunk of his automobile, arresting him before his engine was started. The agents then removed the footlocker to a secure place and opened it without a warrant, and discovered large quantity of marijuana. In ruling that the warrantless search of the footlocker was unjustified, the Court reaffirmed the general principle that closed packages and containers may not be searched without a warrant. 433 U.S. at 11.

[35] In *Sanders,* police received a tip from a reliable informant that respondent would arrive at local airport on a specified flight that afternoon carrying a green suitcase containing marijuana. The officers went to airport and saw respondent arrive and claim a green suitcase. Thereafter officers saw him give suitcase to a waiting companion who placed it in trunk of a taxi. Police followed the taxi, stopped it several blocks away, opened trunk and seized suitcase searched at scene without a warrant, finding marijuana. The Court granting that police had probable cause to believe that suitcase contained marijuana concluded that police were justified in stopping taxi, searching it on the spot and seizing the suspected suitcase. Conceding this, the only question before the Court was whether the police, rather than immediately searching the suitcase without a warrant, should have taken it, along with respondent, to the police station and there obtained a warrant for the search. 442 U.S. at 761.

[36] Professor LaFave also observed that the necessity under *Ross* for probable cause to search the entire vehicle and simply not a single container therein referred to the situation which existed when the search was actually commenced. *Id. Cf. Michigan v. Themos,* ____ U.S. ____ 102 S.Ct. 3079, 3081 (1982).

vehicle and its contents. *Farinacci-Garcia, supra,* 551 F.Supp. at 473. In adopting this distinction, at page ____, 102 S.Ct. at 2166, of its opinion in *Ross,* the Court quoted from that part of Chief Justice Burger's concurrent opinion in *Sanders* which reads:

> Here as in *Chadwick,* it was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick.* The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an "automobile" exception case. The court need say no more.

Again, at page ____, 102 S.Ct. 2168, of the opinion in *Ross,* the Court stated:

> Unlike *Chadwick* and *Sanders,* in this case police officers had probable cause to search respondent's entire vehicle.

And, finally, at page ____, 102 S.Ct. 2167, the Court observed:

> It is clear, however, that in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within, except the footlocker in the former and the green suitcase in the latter.

Thus, where the police officer's suspicion is confined to a particular container, and there is no probable cause for him to search the defendants' entire vehicle, the principles of *Chadwick* and *Sanders* govern the situation. *Farinacci-Garcia, supra,* 473 F.Supp. at 473. Those principles are: "that the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and secured it within their control"; and "that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." *Sanders, supra,* 442 U.S. at 763-65.

Given the *Chadwick-Sanders* distinction recognized in *Ross,* if this warrantless search is to be sustained, there must have been probable cause present to search the entire vehicle. That is the next determination before the Court. But, the term "probable cause" is not susceptible to a precise definition. *See Draper v. United States,* 358 U.S. 307 (1964). Generally speaking, the standard governing the inquiry into the existence of probable cause to search may be summarized as follows: probable cause exists if "the facts and circumstances within [the officers'] knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that" an item subject to seizure will be found in the place to be searched. *Brinegar v. United States,* 338 U.S. 160, 175-76 (1949) (*quoting Carroll v. United States, supra,* 267 U.S. at 162). Probable cause is thus more than bare suspicion, but less than a virtual certainty. *Id.* at 175. As the term implies, probable cause is present if the probability is that the thing sought is in the place to be searched; probabilities are to be assessed in light of practical experience and the practical inference to be drawn from reliable or known facts. *Id.* at 175-76. Police officers are therefore entitled to reasonably rely on their special knowledge and expertise in assessing probabilities and drawing inferences. *United States v. Graza-Hernandez,* 623 F.2d 496, 499 (7th Cir. 1980).

Applying these standards to the instant matter, the Court must find that the facts known to Trooper Hostetter were insufficient to give rise to probable cause which would support a search of the entire vehicle. This finding is corroborated by the fact that after they had sole custody and control over the Corvette, the troopers left it unguarded along the heavily traveled toll road. *See Farinacci-Garcia, supra,* 551 F.Supp. at 465. Furthermore, Trooper Hostetter's testimony does not

persuasively indicate what, if anything, in his experience[37] as a police officer would cause him to reasonably suspect, based upon the defendants' conduct and the totality of the circumstances, that criminal activity was afoot. *See Brown v. Texas,* 443 U.S. 47 (1979). Hostetter's observations did not lead him to restrain or arrest Jerome Griffin until after the contents of the package were visible and confirmed by Trooper Nufer. Even the hint of suspicion that arose from the discovery of the guns evaporated with the reception of the negative readio check.[38] *See United States v. Posey,* 663 F.2d 37, 41 (7th Cir. 1981). Moreover, there is no showing in the record as to what Hostetter thought he would find upon opening the package and the only reason provided for opening the package was to complete his inventory.[39] The precise testimony was that although he "was suspicious of it but didn't know what it would be exactly and decided that irregardless [sic] of what could be in it in the inventory of the car I am responsible for what is in it.

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[37] This absence cannot be blamed on inexperience as Trooper Hostetter was a veteran of ten years of road patrol.

[38] Testimony was provided to the effect that Charles Griffin possessed an "unlimited license" for the guns.

[39] Although the testimony of Trooper Hostetter, the government's sole witness, demonstrated his belief that his actions were proper only under the inventory rationale, consideration of the government's probable cause argument is not foreclosed. While the government is, of course, wed to the trooper's testimony, it is of no importance that he thought his only source of authority was to conduct the inventory. The test is what could lawfully be done, not what he thought the source of his power to be. *United States v. Ochs,* 595 F.2d 1247, 1256 (2nd Cir. 1979). Furthermore, in making that determination, the Court looks to federal rather than state law as "[T]he question whether evidence obtained by state officers and used against a defendant in a federal trial was obtained by unreasonable search and seizure is to be judged as if the search and seizure had been made by federal officers." *Preston v. United States,* 376 U.S. 364, 366 (1974). *Elkins v. United States,* 364 U.S. 206, 223 (1960).

I opened up the end of the back that didn't have tape on it to see what was in it to put down on my inventory . . ." (Supression Hearing Transcript, p. 75).

Thus, the record clearly demonstrates that Trooper Hostetter did not have probable cause to search the vehicle, that he harbored no suspicion as to it and had no specific interest in searching it. Hostetter's suspicion focused solely on the bag and the package within it. Under such circumstances, "the determination of the reasonableness of this warrantless search, according to the reasoning in *Ross,* must be made pursuant to the principle of *Chadwick* and *Sanders." Farinacci-Garcia, supra,* 551 F.Supp. at 473. Following the principles of those two cases, the warrantless search of the package found inside the bag was not justified under the automobile exception. *Id.*

V. Plain view Exception

Finally, because the Court has decided that this case is of the *Cahdwick—Sanders* variety, the Court must resolve the question of whether the search warrant requirement is inapplicable because of the nature of the container utilized herein. Certainly footnote 13 of the *Sander's* opinion supports such an inquiry as its states:

> [N]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.

442 U.S. at 764-65.[40]

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[40] This language was quoted with apparent approval by the Court in *Ross.* 456 U.S. ____, 102 S.Ct. at 2167 n.19.

The easiest case under this line of authority is, of course, that in which there is unquestionably a plain view in the sense of direct observation of the contents because the container is partially open or transparent. LaFave, *supra,* at 180. In this case, the facts establish that the contents were wrapped in opaque paper and that Trooper Hostetter had to open the bag, thus precluding the "easy case." Next, assuming lawful physical contact with the container, would come the "plain touch" case in which touch may reveal the contents so unquestionably that no warrant requirement exist merely because there is a container between the officer and a seizable object. *Id.; See United States v. Portillo,* 633 F.2d 1313 (9th Cir. 1980), *cert. denied,* 450 U.S. 1043 (1981). (Officer putting hand on paper bag felt gun, making contents apparent from outward feel of the container) Trooper Hostetter's testimony forecloses this argument, however, as he testified, "I looked in it again (the bag), was suspicious of it but didn't know what it would be exactly and decided that irregardless [sic] of what would be in it . . . I opened the end . . . to see what was in it." (Transcript p. 75). More likely to arise, under the footnote 13 principle, is the plain smell case, where again no warrant is required provided that the incriminating smell can be attributed directly to the container rather than the vehicle. *Id., United States v. Rivera,* 486 F.Supp. 1025 (N.D. Tex. 1980), *order aff'd and remanded,* 654 F.2d 1048 (5th Cir.), *decision vacated on rehearing,* 684 F.2d 308 (1982) (no probable cause here as no direct linkage between the order and searched bag). This is the argument that the government puts forth as the government contends that the contents were apparent to the trooper because of the medicinal odor. Government's memorandum at 5.

There is, however, no evidence as to the officer's expertise in identifying the "medicinal" odor as opposed to his merely suspecting it to be that of a controlled substance. Nor did the government's proof specifically relate the odor to the searched bag or establish from whence it was actually emanating. *See*

United States v. Rivera, supra, 486 F.Supp., at 1033. In fact, so barren is the record in this regard, there is no direct evidence as to when the odor was first detected. Clearly, if it were encountered after the bag was opened, it would make no difference how profound or pungent the aroma was, for the "plain smell" would be subsequent to the search.[41] Even assuming, *arguendo,* that the "medicinal" odor was discovered prior to opening the bag, the Court is left with nothing more than nonspecific reference to the odor of the bag. That evidence, again confined to the single officer's testimony, provided:

> "Q. Did you do this at the road side?
>
> A. At the road side. I opened up the sack. I noticed a brown, something wrapped inside and it had plastic tape around a brown paper bag it looked like and it had a medicinal odor to it and I also noticed that there was an open jar of like hand cleaner back there and it smelled of that as well. I put the bag back in the compartment where the weapons were, closed it . . ."

(Transcript at 74).

Again, at page 84 of the transcript, the trooper testified:

> "Questions by the court:
>
> Q. Officer, how was the brown package wrapped, can you tell me that?
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> A. Well, sir, the brown—It was in a small brown bag open. Inside that was what looked to be another brown bag that was rolled up and like a plastic tape that you would see on a cardboard box, like a fiber, clear type fiber tape was wrapped around it and pretty well covered the whole thing except the ends, that was just paper and it is my opinion that this hand cleaner that was open in back of the seat and was over in the right corner with the lid off

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[41] The moment Trooper Hostetter opened the bag and looked inside, he conducted a search. *See United States v. Bosby,* 675 F.2d 1174, 1180 (11th Cir. 1982).

> which I thought was peculiar, you could smell that strong and above that it appeared to me that this bag or small package here had this on it. I could smell something besides that."

Certainly, the mere fact that Trooper Hostetter smelled something besides that hand cream is totally insufficient to negate the expectation of privacy otherwise inferable from the use of opaque wrapping paper and strong, fibrous tape. It is the Court's considered opinion, therefore, that the facts do not support a finding that the phencycledine was in plain view and that the warrant requirement is appropriate.

In concluding that this is not a "plain smell" case, this Court is not unmindful of other decisions like *Johnson v. United States,* 333 U.S. 10, 13 (1948), *United States v. Haley,* 669 F.2d 201 (4th Cir.) *cert. denied,* ____ U.S. ____, 102 S. Ct. 2928 (1982). and *United States v. Garcia Rodriquez,* 558 F.2d 956 (9th Cir.) *cert. denied,* 434 U.S. 1050 (1977), where the strong odor of drugs support the finding that the contraband was in plain view. Nevertheless, in those cases the evidentiary records support such a finding, whereas the present record does not. Accordingly, the government "plain view/plain smell" argument must fail.

In reaching this result the Court does not find that a policeman who lacks the precise level of information necessary must simply shrug his shoulder and allow a crime to occur. *Adams v. William,* 407 U.S. 143, 145 (1972). Instead, the Court determines, in light of the fact that the Supreme Court in *Ross* decided to retain the *Chadwick-Sanders* warrant requirement, that "[W]hether the officers experience and expertise permit the conclusion that such a package probably contained [drugs] is exactly the kind of question as to which the judgment of a neutral and detached magistrate would be beneficial." LaFave, *supra* at 185.

CONCLUSION

On the basis of the foregoing, the Court finds that the December 2, 1982 search did not fall within one of the well-delineated exceptions to the warrant requirements of the Fourth Amendment. Accordingly, defendants Motion to Suppress the introduction of 805 grams of phencyclidine which was the product of that search must be, and hereby is, GRANTED.

Enter: March 21, 1983.

WILLIAM C. LEE
William C. Lee, Judge
United States District Court

APPENDIX C

OPINION BY JUDGE COFFEY

Judge Eschbach dissenting
JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 28, 1984.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant

No. 83-1523 *vs.*

CHARLES E. GRIFFIN
and JEROME GRIFFIN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

No. 82 CR 25
William C. Lee, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Fort Wayne Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 29, 1984.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 83-1523 *vs.*

CHARLES E. GRIFFIN
and JEROME GRIFFIN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

No. 82 CR 25
William C. Lee, *Judge.*

ORDER

IT IS ORDERED, *sua sponte,* that the Opinion of this Court in the above-captioned matter, dated February 28, 1984, is amended as follows:

Page 17, first full paragraph, line 12, third word, "possible" change to "possibly."

Page 19, line 2, "deter[ing]" change to "deter[ring]."

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 13, 1984.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 83-1523 *vs.*

CHARLES E. GRIFFIN
and JEROME GRIFFIN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

No. 82 CR 25
William C. Lee, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by the defendants-appellees, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E

Constitutional Provision Involved:

The Fourth Amendment to the Constitution of the United States reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the person or things to be seized.

21 U.S.C. Section 841(a)(1) provides:

> Except as authorized by the sub-chapter, it shall be unlawful for any person knowingly or intentionally—(1) to . . . possess with the intent to distribute . . ., a controlled substance.